(28,853)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 341.

CURTIS, COLLINS & HOLBROOK COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

IN EQUITY.

Bill of Complaint.

To the Judges of the Circuit Court of the United States, for the Ninth Circuit, Northern District of California:

GEORGE W. WICKERSHAM, Attorney General of the United States, and Robt. T. Devlin, United States Attorney for the Northern District of California, for and on behalf of the United States of America, complainant, bring this bill against Edward L. Cooksey, Charles E. Gregory, Curtis, Collins and Holbrook Company, a corporation, John Doe, Richard Doe, Albert Doe, Henry Doe, George Doe, and Frederick Doe. all citizens and all residents of the State and Northern District of California, and hereby made defendants in this bill of complaint; and thereupon your orator complains and says:

I.

That heretofore, to wit, on the 2d day of August, 1920, the said Edward L. Cooksey, under the provisions of the Act of Congress of June 3d, 1878, entitled "An Act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory," as extended to all the Public Land States by act of August 4, 1892, and of the regulations of the Department of the Interior of the United States and of the laws of the United States, filed in the Land Office of the United States at Susanville in the State of California, his certain

sworn statement and application for the purchase of a certain portion of the public lands of the United States described as follows: The Southwest quarter (SW. ¼) of Section Fifteen (15), Township Twenty-five (25) North, Range Ten (10) East, M. D. M., in the district of lands subject to sale at Susanville, California;

Said sworn statement and application was in the manner and form prescribed by the Department of the Interior of the United States and was in due form and the same was duly and regularly accepted by the Register and Receiver of the said Land Office at Susanville, California, and among other matters contained the statement that the said applicant and affiant did not apply to purchase the land above described and in said statement and application described, on speculation, but in good faith to appropriate it to his own exclusive use and benefit and that he had not directly or indirectly made any agreement or contract or in any way or manner with any person or persons whomsoever by which the title he might acquire from the Government of the United States might inure in whole or in part to the benefit of any person except himself.

II.

That said application and sworn statement was duly and regularly subscribed and sworn to by said applicant and affiant before T. A. Roseberry, Register of the said Susanville Land Office; that the said application to purchase and sworn statement was in the form required by the laws of the United States and was then and there made out upon what

was then and there known in the said Department of the Interior as blank form 4–537; that said application and sworn statement was duly and regularly filed with the said Register and Receiver of the said Susanville Land Office on the day last aforesaid.

III.

That for the purpose of perfecting said application the said applicant and affiant did thereafter and in due and proper time present to said Register and Receiver what is known as the non-mineral affidavit required by the laws of the United States and the rules and regulations of the said Department of the Interior; that the same was duly and regularly made out on what is known in the said Department of the Interior of the United States as form 4–062.

IV.

That said applicant and affiant supplied the testimony required by the laws of the United States and the rules and regulations of the Department of the Interior and paid the fees, required by law and also the moneys required by law for the purchase of said land, and thereupon the Receiver then in office did duly and regularly execute unto the said affiant and applicant what is known as a Receiver's Receipt; that said receipt was dated the 16th day of October, 1902, and did acknowledge the receipt of said moneys as being in full for the land above described; that said receipt was duly and regularly signed by the proper officer who was then and there the Receiver of the United States

at the Susanville Land Office; a duplicate thereof at the time and place of making the same as aforesaid was delivered by the said Receiver to the said applicant and affiant. [1*]

V.

That in compliance with law the said Register of the said Land Office did give notice that the said applicant and affiant had filed in his office his said sworn statement for the purchase of the land as hereinabove described, and would at a time and place fixed in said notice offer proof to show that the land sought was more valuable for its timber and stone than for agricultural purposes, and would establish his claim to said land before the Register and Receiver of said office at Susanville, State of California, at said time and place and said notice was in compliance with law duly published in a newspaper in accordance with law for the time required by law.

That at the time named in said notice said applicant and affiant did appear with his witnesses and did testify in said proceeding.

That thereat said applicant and affiant did testify under oath regularly administered to him by an officer of the Government of the United States duly qualified to administer oaths that he the said applicant and affiant did not apply for said land for the purpose of obtaining title to the mineral land but with the object of securing said land for timber purposes and did desire to secure the same for his own exclusive use and benefit; that said

*Page-number appearing at foot of page of original certified Transcript of Record.

testimony was false and untrue in that said applicant did not intend to secure his said land for his own use and benefit but for the use and benefit of others, to wit: Charles E. L. Gregory and the Curtis, Collins and Holbrook Company.

That said applicant and affiant complied with all the forms of law required to obtain a patent to the lands hereinbefore described, and that the said proofs offered by him were accepted by the said officials of the United States Land Office at Susanville, California, and by the officials of the Department of the Interior of the United States as being in all respects regular and sufficient and as establishing the right of the said applicant and affiant to have issued to him a patent to the said lands hereinabove described; and in accordance with the rules and regulations of the Department of the Interior of the United States, the complainant herein by and through its proper officials duly and regularly executed and issued upon the 8th day of June, 1904, its patent to the said tract of land hereinbefore described to the said applicant and affiant under the Acts of Congress hereinbefore described, which said patent purported to convey to the said applicant and affiant the title to the said lands; That the complainant and all and each of its officers accepted said proofs without any knowledge or notice of their falsely or of the fraud herein set out and prior to the issuance of said patent had no notice or knowledge of said fraud but on the contrary believed the said statements of said appli-

cant to be true and believe that his application was made in good faith.

VI.

That the said entry hereinbefore described was not made in good faith under the laws of the United States nor was said patent secured for the exclusive use and benefit of the said applicant and affiant but at the instance and in the interest of other parties; that said statement that the said applicant applied to purchase said land for his own exclusive use and benefit was false and untrue in that said applicant before the filing aforesaid had agreed to convey the same to Charles E. Gregory and the Curtis, Collins and Holbrook Company. That the other defendants hereinbefore the acquisition of title by them or either of them had full notice and knowledge of said fraud.

That on, to wit, the 25th day of October, 1902, said applicant and affiant did convey the land hereinbefore described to Charles E. Gregory, defendant aforesaid; that said defendant Charles E. Gregory, did on, to wit, the 2d day of May, 1903, convey the said land to the Curtis, Collins and Holbrook Company, defendant.

That the said Curtis, Collins and Holbrook Company is a corporation, organized, existing and doing business under and by virtue of the laws of the State of California.

That the said Charles E. Gregory and the said Curtis, Collins and Holbrook Company knew of the fraud hereinbefore described, and did request and procure the said Edward L. Cooksey to make

the entry aforesaid and obtain the patent aforesaid for their use and benefit; that they did know that said Edward L. Cooksey was not making the said entry for his own exclusive use and benefit, but for their use and benefit, and the said defendants Charles E. Gregory and the Curtis, Collins and Holbrook Company knew that the said patent had been obtained by the false statements of the said Edward L. L. Cooksey, as hereinbefore described. [2]

VII.

That the complainant does not know the true names of the defendants John Doe, Richard Doe, Albert Doe, Henry Doe, George Doe and Frederick Doe and therefore it sues them by fictitious names aforesaid and prays that when their true names are discovered they may be inserted herein and this Bill may be amended accordingly.

VIII.

That all the defendants claim an interest in said land adverse to complainant, but said claim is wholly without right.

IX.

That said patent so executed and issued and the said deeds of conveyance were and are a cloud upon complainant's title.

X.

And lastly in support of the averments of this bill, your orator begs leave to refer to the aforesaid application of the said applicant and affiant and to all of the affidavits, papers, documents, depositions, receipts, certificates, and proceedings

had in the matter of the making of said entry and application to purchase, in so far as the same may relate to the issuance of the said patent, and to the records of the General Land Office of the United States and of the Department of the Interior of the United States, or to certified copies thereof.

Forasmuch as your orator can have no adequate relief, except in this court, and to the end, therefore, that the defendants may, if they can, show why your orator should not have the relief prayed, and may make a full, disclosure and discovery of all of the matters aforesaid, and according to the best and utmost of their knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being hereby expressly waived.

WHEREFORE, your orator prays relief and decree of this Honorable Court that the patent to the land in this bill of complaint described, as issued by complainant to defendant Edward L. Cooksey, be recalled and canceled; that the money paid to the United States by said defendant Edward L. Cooksey, as the purchase price of said land, be forfeited to the United States and that the defendants and all other persons claiming under them be forever estopped from asserting any right, title or interest to said land, and that the land described in said patent and this bill of complaint be declared public land of the United States, and that said patent and said deeds be declared null and void;

and that this complainant may have such other and further relief as may seem to accord with the principles of equity.

May it please the Court to grant to the United States the writ of subpoena issuing out and under the seal of this Honorable Court, directed to the defendants, Edward L. Cooksey, Charles E. Gregory and the Curtis, Collins and Holbrook Company and John Doe, Richard Doe, Albert Doe, Henry Doe and Frederick Doe, on a day certain, to be named therein to be and appear before this Honorable Court to answer all and singular the premises, and to stand and abide by such other orders, directions and decrees as may be made therein.

GEORGE W. WICKERSHAM,
Attorney General of the United States.
ROBT. T. DEVLIN,
United States Attorney for the Northern District of California and Solicitor for Complainant.

[Endorsed]: Bill of Complaint. Filed Jun. 9, 1910. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [3]

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

IN EQUITY—No. 15,077.

UNITED STATES OF AMERICA,
Complainant,

vs.

EDWARD L. COOKSEY, CHARLES E. GREGORY, CURTIS, COLLINS and HOLBROOK COMPANY (a Corporation), JOHN DOE, RICHARD DOE, ALBERT DOE, HENRY DOE, GEORGE DOE, and FREDERICK DOE,
Defendants.

Answer of Curtis, Collins and Holbrook Company.

Now comes the above-named defendant, Curtis, Collins and Holbrook Company, and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exceptions or otherwise, which can or may be had or taken to the many errors, uncertainties and imperfections in said bill of complaint contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer thereto, answering, respectfully shows to the Court and says:

Admits that the said defendant, Curtis, Collins and Holbrook Company, is a corporation organized, existing and doing business under and by vir-

tue of the laws of the State of California, and admits that the said defendants are and each of them is a citizen and resident of the State and Northern District of California.

Admits that heretofore, to wit, on the 2d day of August, 1902, the said defendant, Edward L. Cooksey, under the provisions of the Act of Congress of June 3, 1878, entitled: "An Act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory," as extended to all the Public Lands States by Act of August 4, 1892, and of the regulations of the Department of the Interior of the United States, and of the laws of the United States, filed in the Land Office of the United States at Susanville, in the State of California, his certain sworn statement and application for the purchase of a certain portion of the public lands of the United States, described as follows: The Southwest quarter (SW. ¼) of Section Fifteen (15), Township Twenty-five (25) North, Range Ten (10) East, M. D. M., [4] in the district of lands subject to sale at Susanville, California.

Admits that said sworn statement and application was in the manner and form prescribed by the Department of the Interior of the United States and was in due form, and the same was duly and regularly accepted by the Register and Receiver of the said Land Office at Susanville, California, and among other matters, contained the statement that the said applicant and affiant did not apply to purchase the said land in said bill of complaint

and in said statement and application described, on speculation, but in good faith, to appropriate it to his own exclusive use and benefit, and that he had not directly or indirectly made any agreement or contract in any way or manner with any person or persons whomsoever, by which the title he might acquire from the Government of the United States, might inure in whole or in part to the benefit of any person except himself.

Admits that said application and sworn statement was duly and regularly subscribed and sworn to by said applicant and affiant before T. A. Roseberry, Register of the said Susanville Land Office; that the said application to purchase and sworn statement was in the form required by the laws of the United States, and was then and there made out upon what was then and there known in the said Department of the Interior as blank form 4–537; that said application and sworn statement was duly and regularly filed with the said Register and Receiver of the said Susanville Land Office on the said 2d day of August, 1902.

Admits that for the purpose of perfecting said application, the said applicant and affiant did thereafter and in due and proper time, present to said Register and Receiver what is known as the non-mineral affidavit required by the laws of the United States, and the rules and regulations of the said Department of the Interior; that the said affidavit was duly and regularly made out on what is known in the said Department of the Interior of the United States as form 4–062.

Further answering said bill of complaint and particularly the allegations contained in paragraph IV thereof, this defendant alleges that it has no knowledge, or remembrance of the matters therein alleged, but to the best and utmost of its information it believes that said applicant and affiant supplied the testimony required by the laws of the United States and the rules and regulations of the Department of the Interior, and paid the fees required by law, and also the moneys required by law for the purchase of said land, and thereupon the Receiver then in office did duly and regularly execute unto the said affiant and applicant what is known as a Receiver's receipt; that said receipt was dated the 16th day of October, 1902, and did acknowledge the receipt of said moneys as being in full for the land above and in said bill of complaint described; that said receipt was duly and regularly signed by the proper officer who was then and there the Receiver of the United States at the Susanville Land Office; a duplicate thereof at the time and place of making the same as aforesaid, was delivered by the said Receiver to the said applicant and affiant.

Further answering said bill of complaint and particularly the allegations contained in paragraph V thereof, this defendant alleges that it has no knowledge or remembrance of the matters therein alleged, except as to those allegations hereinafter specially denied or admitted, [5] but to the best and utmost of its information, it believes that in compliance with law, the said Register of the said

Land Office did give notice that the said applicant and affiant had filed in his office his said sworn statement for the purchase of the land hereinbefore and in said bill of complaint described, and would at a time and place fixed in said notice, offer proof to show that the land sought was more valuable for its timber and stone than for agricultural purposes, and would establish his claim to said land before the Register and Receiver of said Land Office at Susanville, State of California, at said time and place, and said notice was in compliance with law, duly published in a newspaper in accordance with law, for the time required by law; that at the time named in said notice, said applicant and affiant did appear with his witnesses and did testify in said proceeding; that thereat, said applicant and affiant did testify under oath regularly administered to him by an officer of the Government of the United States, duly qualified to administer oaths, that he, the said applicant and affiant, did not apply for said land for the purpose of obtaining title to the mineral land but with the object of securing said land for timber purposes and did desire to secure the same for his own exclusive use and benefit; that said applicant and affiant complied with all the forms of law required to obtain a patent to the lands hereinbefore and in said bill of complaint described, and that the said proofs offered by him were accepted by said officials of the United States Land Office at Susanville, California, and by the officials of the Department of the Interior of the United States as being in all respects regular and

sufficient, and as establishing the right of said applicant and affiant to have issued to him a patent to the said land hereinbefore and in said bill of complaint described.

And further answering the allegations contained in paragraph V of said bill of complaint, and particularly the following portion thereof:

> "That said testimony was false and untrue in that said applicant did not intend to secure his said land for his own use and benefit, but for the use and benefit of others, to wit: Charles E. Gregory and the Curtis, Collins and Holbrook Company,"

this defendant alleges that it has no knowledge or remembrance touching the matters contained in said last mentioned allegation, but so far as the same relate to the said Edward L. Cooksey this defendant is informed and believes that said testimony was not false and untrue or false or untrue, in the particulars set forth in said allegation or in any particulars or otherwise, or at all, but on the contrary, this defendant alleges on its information and belief that the said applicant did intend to and did secure his said land for his own use and benefit and that he did not intend to secure and that he did not secure his said lands for the use and benefit or for the use or benefit of others, to wit, Charles E. Gregory and the Curtis, Collins and Holbrook Company, or any other person or persons, copartnership or copartnerships, corporation or corporations. That this defendant denies, upon its information and belief, that said applicant intended to

secure said land for the use and benefit or the use or benefit of this defendant, the Curtis, Collins and Holbrook Company, and alleges: That if the said applicant did intend to secure said land for the use and benefit or the use or benefit of this defendant, Curtis, Collins and Holbrook Company, or said defendant, Charles E. Gregory, or any other person or persons, copartnerships or corporations, that this defendant had no knowledge and it denies having any knowledge of such intent, therefore this defendant leaves complainant to make such proof as it shall be advised, to sustain the said allegation in said paragraph V in said bill of complaint contained. [6]

And this defendant further answering said bill of complaint and particularly the allegations contained in paragraph V thereof, admits that said applicant and affiant complied with all the forms of law required to obtain a patent to the lands in said bill of complaint described, and that the said proofs offered by him were accepted by the said officials of the United States Land Office at Susanville, California, and by the officials of the Department of the Interior of the United States as being in all respects regular and sufficient and as establishing the right of said applicant and affiant to have issued to him a patent to the said lands hereinbefore and in said bill of complaint described, and in this connection, this affiant alleges upon its information and belief that said proofs offered by said applicant and affiant were in all respects regular and sufficient and established his right to have

issued to him a patent to the said lands described in said bill of complaint.

And further answering said bill of complaint and particularly the allegations contained in paragraph V thereof, this defendant admits that in accordance with the rules and regulations of the Department of the Interior of the United States, said complainant by and through its proper officials duly and regularly executed and issued upon the 8th day of June, 1904, its, said complainant's, patent to the said tract of land hereinbefore and in said bill of complaint described, to the said applicant and affiant, under the Acts of Congress mentioned in said bill of complaint, which said patent purported to convey and this defendant alleges that it, said patent, did convey to the said applicant and affiant, to wit, the said Edward L. Cooksey, the title to the said lands.

And further answering said bill of complaint and particularly the allegations contained in paragraph V thereof, this defendant alleges that it has no knowledge, information, remembrance or belief as to whether or not the said complainant and all and each or all or each or any of its officers accepted said proofs or any proofs, without any knowledge, or knowledge or notice, of their alleged falsity or of the alleged fraud set forth in said bill of complaint, and that prior or that prior to the issuance of said patent, complainant and all and each or any of its officers had no notice or knowledge of said alleged fraud, therefore this defendant leaves complainant to make such proof as it

shall be advised, to sustain said last mentioned allegation in said paragraph V of said bill of complaint contained.

And further answering said bill of complaint and particularly the allegations contained in paragraph VI thereof, this defendant alleges that, except as to those matters hereinafter particularly denied or admitted, it has no knowledge or remembrance concerning the matters in said paragraph VI alleged, but this defendant upon its information and belief denies that the said entry mentioned and described in said bill of complaint was not made in good faith under the laws of the United States or otherwise, and that said patent, or that said patent, was not secured for the exclusive use and benefit or the exclusive use or benefit, or for the use or benefit of the said applicant and affiant or applicant or affiant, but at the instance and in the interest or at the instance or in the interest of any other party or parties whomsoever. This defendant denies that the said statement that the said applicant applied to purchase said land for his own exclusive use and benefit was false and untrue or false or untrue in that said applicant, before the filing aforesaid, had agreed to convey the said lands mentioned in said bill of complaint to the said Curtis, Collins and Holbrook Company.

That this defendant has no knowledge or information as to whether the said allegation contained in said paragraph VI of said bill of complaint that the said applicant applied to purchase said lands for his own exclusive use and benefit, was false and

untrue or false or untrue in that said applicant before the filing aforesaid had agreed to convey the lands mentioned [7] in said bill of complaint to Charles E. Gregory, but to the best and utmost of its information, this defendant believes that the said applicant, before the filing aforesaid or prior to the filing of said application, had not agreed to convey the said lands mentioned in the said bill of complaint to said last-named defendant or to any other person or persons, corporation or copartnerships. That this defendant denies that before the acquisition of title by it, or at any other time, it had full or any notice and knowledge or full or any notice or knowledge of the alleged fraud set forth in complainant's said bill of complaint or of any other fraud. That this defendant has no knowledge or remembrance as to whether the said defendant Charles E. Gregory had full notice and knowledge or had any notice or knowledge of the fraud alleged in said paragraph VI of said bill of complaint or of any fraud, but to the best and utmost of its information this defendant believes that the said Charles E. Gregory did not have full or any notice or knowledge of said alleged or any fraud, therefore, this defendant leaves complainant to make such proof as it shall be advised to sustain the said allegations contained in said paragraph VI of said bill of complaint.

And further answering the allegations contained in paragraph VI of said bill of complaint, this defendant admits that on the 25th day of October, 1902, said applicant and affiant did convey the land

described in said bill of complaint, to said Charles E. Gregory, and that on the 2d day of May, 1903, the said Charles E. Gregory did convey said land to this defendant, the Curtis, Collins and Holbrook Company and admits that this defendant, the Curtis, Collins and Holbrook Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California.

And further answering said bill of complaint and particularly the allegations contained in paragraph VI thereof, this defendant denies that it knew of the said alleged fraud set forth in said bill of complaint or of any fraud or that it did request and procure or request or procure the said Edward L. Cooksey or any other person or persons to make the entry alleged in said bill of complaint or any other entry, and obtain or obtain the patent mentioned therein, or any patent, for its use and benefit or for its use or benefit or otherwise, or to make the entry described in said bill of complaint or any entry, or to obtain the patent mentioned in said bill of complaint or any patent for its use and benefit, or for its use or benefit, or for the use or benefit of any other person or persons whomsoever, and this defendant denies that it knew that said Edward L. Cooksey was not making said or any alleged entry as alleged in said bill of complaint for his own exclusive use and benefit or for his own exclusive use or benefit, or for his use or benefit, but for the use and benefit or for the use or benefit of the said defendants Charles E. Gregory and the said Curtis, Collins and Holbrook Company, or either of them,

or for any other person, copartnership or corporation, and this defendant denies that it knew or ever knew or that it now knows that the said patent mentioned in said bill of complaint, or any patent, had been obtained, or was obtained by the alleged false statements of the said Edward L. Cooksey, set forth in said bill of complaint or by any false statements of the said Edward L. Cooksey, or of any other person or persons whomsoever, or by any false statements whatsoever. That this defendant is informed and believes that the said Charles E. Gregory did not [8] know before the acquisition by him of the title to the lands described in said bill of complaint or at any other time, of the alleged fraud set forth in said bill of complaint or of any other fraud in connection with the acquisition of said land by the said Edward L. Cooksey, and that he, the said Charles E. Gregory, did not request and procure or request or procure the said Edward L. Cooksey, or any other person or persons to make the entry mentioned in said bill of complaint or to make any other entry and obtain the patent or obtain the patent mentioned in said bill of complaint or any other patent for his, said Charles E. Gregory's use and benefit, or his, said Charles E. Gregory's use or benefit, or for the use and benefit or the use or benefit of any person or persons, copartnership or corporation whatsoever, other than said applicant.

That this defendant believes that if the said Edward L. Cooksey, as alleged in said bill of complaint or otherwise, was not making said entry for

his own exclusive use and benefit or for his own exclusive use or benefit, or for his own use or benefit, that the said Charles E. Gregory did not know of the same and that if the said Edward L. Cooksey made said entry or was making said entry for the use and benefit of the use or benefit of him, the said Charles E. Gregory, or of this defendant, that he, the said Charles E. Gregory, did not know of the same.

And this defendant further alleges that if the said patent mentioned and described in complainant's bill of complaint was or had been obtained by the said Edward L. Cooksey by the alleged false statements of him, the said Edward L. Cooksey, set forth in said bill of complaint, or by any other false statement or statements, that this defendant believes that the said Charles E. Gregory did not know of the same.

This defendant alleges that if the said entry mentioned in said bill of complaint was made by the said applicant mentioned therein, at the request, procurement or instance or in the interest of and for the use or benefit of any person or persons other than said applicant, or if the said patent mentioned in said bill of complaint was obtained by the said applicant for the use and benefit of any person or persons other than said applicant, that the same was not known to this defendant, nor, to the best and utmost of its information and belief, to the said defendant Charles E. Gregory before or when this defendant and the said Charles E. Gregory respectively acquired the title to said property

as alleged in said bill of complaint. Except this defendant admits that when said patent was issued it inured to the benefit of the title to said land which this defendant had theretofore acquired from said applicant as hereinbefore alleged, and in that sense and that sense only, said patent was obtained for the use and benefit of this defendant.

That this defendant is informed and believes that the said Charles E. Gregory did not know of the alleged fraud set forth and described in said bill of complaint, or of any other fraud, and that he, said Charles E. Gregory, did not request and procure or request or procure the said Edward L. Cooksey or any other person or persons to make the entry mentioned in said bill of complaint and obtain or obtain the patent mentioned in said bill of complaint, or any patent, for his, said Charles E. Gregory's, use or benefit, or for the use and benefit of, or the use or benefit of any other person or persons, copartnership or corporation. [9]

That this defendant believes that he, the said Charles E. Gregor,y did not know that the said Edward L. Cooksey, as alleged in said bill of complaint, or otherwise, was not making said entry for his own exclusive use and benefit, or for his own exclusive use or benefit, or for his own use or benefit, or that he was making said entry for the use and benefit or for the use or benefit of him, the said Charles E. Gregory, or of this defendant, and that the said Charles E. Gregory did not know that the said or any patent had been obtained by the alleged false statement of the said Edward L. Cooksey set

forth in the bill of complaint on file herein or by any other false statement or statements whatsoever.

This defendant admits that it claims an interest in said lands described in said bill of complaint, adverse to the complainant, but denies that it claims wholly or at all without right.

And further answering said bill of complaint and particularly the allegations contained in paragraph VIII thereof, this defendant admits that it claims an interest in said land described in said bill of complaint, adverse to complainant, but denies that it claims wholly or at all without right.

And further answering said bill of complaint, and particularly the allegations contained in paragraph IX thereof, this defendant denies that said patent mentioned in said bill of complaint, or any patent, so executed and issued, or so executed or issued, and that said deeds of conveyance were or that said deeds of conveyance were, or any of them were or are a cloud upon complainant's alleged title, and in this connection this defendant alleges that the said complainant has no right, title or interest in the land described in said bill of complaint or any part or portion thereof. [10]

SEPARATE DEFENSE.

And further answering said bill of complaint and as a separate defense thereto, this defendant respectfully alleges:

I.

That it is and ever since the 15th day of August, 1902, has been a corporation duly organized and existing under and by virtue of the laws of the State of

California and a resident and citizen of the State and Northern District of California; that it became a corporation under the laws of the said State of California, on the said 15th day of August, 1902.

II.

That on the 2d day of August, 1902, all that certain lot, piece or parcel of land situate in the State of California, and particularly described as follows, to wit: The southwest quarter (SW. ¼) of section Fifteen (15), Township Twenty-five (25) North, Range Ten (10) East, M. D. M., in the district of land subject to sale at Susanville, California, was a portion of the public lands of the United States.

III.

That on the said 2d day of August, 1902, the said defendant Edward L. Cooksey, who was then and there a resident and citizen of the United States, under the provisions of an Act of Congress of June 3, 1878, entitled: "An Act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory," as extended to all the Public Lands States by Act of August 4, 1892, and of the regulations of the Department of the Interior of the United States and of the laws of the United States, filed in the Land Office of the United States at Susanville in the State of California, his certain sworn statement and application for the purchase of said lands.

IV.

That said sworn statement and application was in the manner and form prescribed by the Department of the Interior of the United States, was in due form

and was duly and regularly accepted by the Register and Receiver of said Land Office at Susanville, California, and among other matters contained the statement that the said applicant and affiant, to wit, the said Edward L. Cooksey, did not apply to purchase said described land on speculation but in good faith to appropriate it to his own exclusive use and benefit and that he had not directly or indirectly made any agreement or contract in any way or manner with any person or persons whomsoever by which the title he might acquire to said lands from the Government of the United States, might inure in whole or in part to the benefit of any person or persons except or other than himself.

V.

That after proceedings duly had for that purpose, the United States of America, the complainant herein, on the 16th day of October, 1902, by the hand of its officers thereunto duly authorized, issued and delivered to the said defendant, Edward L. Cooksey, its Register Certificate of Entry No. ——, in which certificate it was recited and declared that the said Edward L. Cooksey, [11] in pursuance of law, had on the said 16th day of October, 1902, purchased of the Register of the United States Land Office at Susanville, California, said hereinbefore particularly described property for which the said Edward L. Cooksey had made payment in full, as required by law and that on presentation of said certificate to the Commissioner of the General Land Office, he, the said Edward L. Cooksey, should be entitled to receive a

patent for the hereinbefore particularly described property.

VI.

That on the 25th day of October, 1902, and subsequent to the filing of said sworn statement and application, the said Edward L. Cooksey, made, executed, acknowledged and delivered to the said defendant, Charles E. Gregory, his, the said Edward L. Cooksey's grant, bargain and sale deed, under and by the terms of which (he) conveyed the said described land and property to said Charles E. Gregory.

VII.

That thereafter, to wit, on the 2d day of May, 1903, said defendant, Charles E. Gregory, by his deed of grant, bargain and sale duly signed, executed and delivered, conveyed to this defendant, the Curtis, Collins and Holbrook Company, the said hereinbefore described property.

VIII.

That subsequently, to wit, on the 8th day of June, 1904, the said complainant by its officers thereunto duly authorized, issued to the said Edward L. Cooksey, its patent, under and by the terms of which it granted to the said Edward L. Cooksey all the hereinbefore described property.

IX.

That this defendant, the Curtis, Collins and Holbrook Company, purchased said land in good faith and paid therefor a valuable consideration, which consideration was paid and which purchase was made by this defendant without knowledge or notice of any defect in the title or without knowledge or notice

that the laws of the United States in the matter of the entry of said lands had not been in all things and respects complied with, and without knowledge or notice of any claim upon the part of the complainant to that effect and without knowledge or notice of any false statement or fraud practiced or perpetrated by the said Edward L. Cooksey as in said bill of complaint alleged, or otherwise, or by any other person or at all. That prior to such purchase and payment by this defendant, the complainant, had issued to the said Edward L. Cooksey as aforesaid, its duly authenticated certificate to the effect that the said land hereinbefore specifically described had been bought and paid for by the said Edward L. Cooksey.

X.

That at the time this defendant purchased said described land, it, in good faith believed that the laws of the United States had in all things and in all respects been complied with in the matter of the original entry thereof and that the said Edward L. Cooksey was entitled to receive a patent from complainant for the said lands. That relying upon such final receipt and certificate and without knowledge or notice of any fraudulent acts on the part [12] of the said applicant and without notice of any claim upon the part of the complainant that said Act of Congress had not been fully and in all respects complied with, this defendant purchased said lands and paid a valuable consideration therefor.

XI.

That said complainant herein, for more than five years and eleven months after the issuance of said

patent, took no action to set the same aside or annul the same, or call the same in question, notwithstanding the officers of said complainant, as this defendant is informed and believes, were, during all of said time, and prior to the issuance of said patent, well aware of all of the facts relative to the entry of said lands and concerning the title thereto. That this defendant was and is the innocent purchaser of said land in good faith and for a valuable consideration, and at the time of such purchase it had no information or knowledge of any fact or facts which would lead it to believe that the title to said land was not good or was in question, and that it had no notice, or knowledge, either actual or constructive, of any fraud on the part of its grantor or of said entrymen, or of any other person whomsoever.

XII.

And this defendant, in addition to the foregoing answer and as a further defense to the complainant's bill of complaint on file herein, avers that said complainant has been and is guilty of laches, in that more than six years have elapsed since the application mentioned in said bill of complaint was filed and more than five years and eleven months have elapsed since the patent mentioned in said bill of complaint was issued, notwithstanding, as this defendant is informed and believes, said complainant and its officers, during the whole of said respective periods and times, knew of the alleged facts set up in said bill of complaint which, it is alleged therein, constituted fraud.

XIII.

And this defendant, in addition to the foregoing

answer, and as a further defense to the complainant's bill of complaint herein, alleges that the said patent mentioned in said bill of complaint was not issued by said complainant within six years before the said suit was brought and this allegation this defendant makes in bar of the complainant's bill of complaint, and prays that it may have the same benefit therefrom as if it had formally pleaded the same.

XIV.

And this defendant, in addition to the foregoing answer, and as a further defense to the complainant's bill of complaint herein, avers that the cause of action, if any there may be arising to complainant, on account or by reason of the several allegations or complaints in its said bill contained, did not accrue within six years before the said bill was filed and the subpoena and process issued thereon, served on this defendant, and this allegation this defendant makes in bar of the complainant's bill and prays that it may have the same benefit therefrom as if it had formally pleaded the same.

XV.

And this defendant, in addition to the foregoing answer, and as a further defense to the complainant's bill of complaint herein, avers that the cause of action, if any there may be arising to complainant, on account or by reason of the several allegations or complaints in its said bill contained, did not accrue within six years before the said suit was brought, and this allegation this defendant makes in bar of the complainant's bill, and prays that it may have the same benefit therefrom as if it had formally pleaded the same. [13]

XVI.

And this defendant denies all, and all manner of unlawful combination, confederacy and conspiracy with which it is charged by said bill, and alleges that any other matter, cause or thing in said complainant's bill of complaint alleged material or necessary for this defendant to make answer unto, and which is not hereby well and sufficiently answered, is not true to the knowledge or belief of this defendant, all of which matters and things, this defendant is willing and ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges, herein most wrongfully sustained.

CURTIS, COLLINS AND HOLBROOK COMPANY,

[Seal] Defendant.

By CHARLES A. SHURTLEFF,
Secretary.

CHARLES A. SHURTLEFF,
Solicitor and Attorney for Defendant, Curtis, Collins and Holbrook Company, San Francisco, Cal.

CHARLES A. SHURTLEFF,
Of Counsel. [13½]

State and Northern District of California,
City and County of San Francisco,—ss.

Charles A. Shurtleff, being duly sworn, deposes and says that he is an officer, to wit, Secretary of the Curtis, Collins and Holbrook Company, a corporation, one of the defendants, in the foregoing suit, that he has read the foregoing answer and knows the contents thereof; that the same is true to the best of his knowl-

edge and belief. That he makes this affidavit for and on behalf of said defendant corporation.

CHARLES A. SHURTLEFF.

Subscribed and sworn to before me this 24th day of February, 1911.

[Seal] FLORA HALL,

Notary Public in and for the City and County of San Francisco, State of California.

Service by copy of the within Answer is hereby admitted this 25 day of February, 1911.

ROBT. T. DEVLIN,
Attorney for Complainant.

[Endorsed]: Answer of Curtis, Collins and Holbrook Company. Filed Feb. 25, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [14]

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

IN EQUITY—No. 15,077.

UNITED STATES OF AMERICA,
Complainant,

vs.

EDWARD L. COOKSEY et al.,
Defendants.

Answer of Edward L. Cooksey.

Now comes the above-named defendant Edward L. Cooksey, and at all times hereafter saving and re-

serving to himself all manner of benefit and advantage of exceptions, or otherwise, which can or may be had or taken to the many errors, uncertainties, imperfections in said bill of complaint contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary to make answer thereto, answering, respectfully shows to this Court and says:

That he admits the allegations contained in Paragraph I of said bill of complaint.

That he admits the allegations contained in paragraph II of said bill of complaint.

That he admits the allegations contained in paragraph III of said bill of complaint.

That he admits the allegations contained in paragraph IV of said bill of complaint.

That except as hereinafter specifically denied, this defendant admits the allegations contained in paragraph V of said bill of complaint. Denies that said testimony of this defendant mentioned in said paragraph V of said bill of complaint was false and untrue or false or untrue, in that said applicant, this defendant, did not intend to secure said land for his own use and benefit, or for his own use or benefit, but for the use and benefit or use or benefit of others, to wit, Charles E. Gregory, Curtis, Collins & Holbrook Company, or either of any of them; and this defendant denies that said testimony was false or untrue in any other particular at all or that he secured said land for the use and benefit or the use or benefit of any other person or persons, copartnerships or corporations at all.

And further answering said bill of complaint and particularly the allegations contained in paragraph V thereof, this defendant alleges that he has no knowledge, information, remembrance or belief as to whether or not the said complaint and all, and each or all or each or any of its officers accepted said proofs mentioned in paragraph V, or any proofs, without any knowledge or notice of their alleged falsity or of the alleged fraud set forth in said bill of [15] complaint, and that prior or that prior to issuance of said patent mentioned in said paragraph V of said bill of complaint all or each or any of its officers had no notice or knowledge of said alleged fraud. Therefore, this defendant leaves complainant to make such proof as it may be advised to sustain said last-mentioned allegations in said paragraph V in said bill of complaint contained. And in this connection, this defendant alleges, that said proofs mentioned in said paragraph V were not false in any respect or at all and that there was no fraud of any kind or character committed in connection with the issuance of said patent. That this defendant denies that said entry mentioned in said bill of complaint was not made in good faith under the laws of the United States, and otherwise, or that said patent was not secured for the exclusive use and benefit of this defendant, or that said patent was secured at the instance or in the interest of any other party or parties; denies that said statement, that the said applicant, to wit, this defendant, applied to purchase said land for his own exclusive use and benefit, is false and untrue

or false or untrue, in that applicant, before the filing mentioned in said bill of complaint, had agreed to convey the said land to Charles E. Gregory and the other defendant companies, or to either or any of them, or any other person or at all, or that said statement was false or untrue in any other respect or at all.

Admits, that on the 25th day of October, 1902, this defendant conveyed the land described in said bill of complaint to the defendant Charles E. Gregory.

And further answering the allegations contained in paragraph VI of said bill of complaint, this defendant denies that the said defendant Charles E. Gregory, and the defendant Curtis, Collins and Holbrook Company, or either of them, did request and procure or did request or procure this defendant to make the entry mentioned in said bill of complaint or to obtain the patent mentioned therein, for their or either of their use and benefit.

This defendant denies that the said patent mentioned in said bill of complaint was obtained by the alleged false statements set forth in the said bill of complaint, or by any false statements whatsoever.

This defendant denies all and all manner of unlawful combination, confederacy, and conspiracy with which it is charged by said bill, and alleges that any other matter, cause or thing in said complainant's bill of complaint alleged material or necessary for this defendant to make answer unto, and which is not hereby well and sufficiently answered, is not true to

the knowledge or belief of this defendant, all of which matters and things, this defendant is willing and ready to aver, maintain and prove, as this honorable Court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges, herein most wrongfully sustained.

J. G. DE FOREST,

Solicitor and Attorney for said Defendant, Edward L. Cooksey, San Francisco, Cal.

J. G. DE FOREST.

Of Counsel.

Service by copy of the within Answer is hereby admitted this 25 day of February, 1911.

ROBT. T. DEVLIN,

Attorney for Complainant.

[Endosed]: Answer of Edward L. Cooksey. Filed Feb. 25, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [16]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 15,077.

UNITED STATES OF AMERICA,

Complainant,

vs.

EDWARD L. COOKSEY et al.,

Defendants.

Replication to answer of Edward L. Cooksey.

This replicant, saving and reserving to itself all

and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendant, for replication thereunto sayeth that it does and will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is very uncertain, evasive and insufficient in the law to be replied unto by this replicant, without this, and any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this honorable Court shall direct, and humbly as in and by its said bill it has already prayed.

ROBT. T. DEVLIN,
United States Attorney,
Solicitor for Complainant.

[Endorsed]: Service of the within Replication by copy admitted this 18 day ow April, 1911.

J. G. DE FOREST,
Attorney for Defendant.

Filed Apr. 19, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 15,077.

UNITED STATES OF AMERICA,
Complainant,

vs.

EDWARD L. COOKSEY et al.,
Defendants.

Replication to Answer of Curtis, Collins & Holbrook Co.

This replicant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendant, for replication thereunto sayeth that it does and will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is very uncertain, evasive and insufficient in the law to be replied unto by this replicant, without this, and any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this honorable Court

shall direct, and humbly as in and by its said bill it has already prayed.

ROBT. T. DEVLIN,
United States Attorney,
Solicitor for Complainant.

[Endorsed]: Service of the within Replication by copy admitted this 18 day of April, 1911.

CHARLES A. SHURTLEFF,
Attorney for Defendant.

Filed Apr. 19, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [18]

At a stated term, to wit, the March term, A. D. 1911, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 1st day of May, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,077.

UNITED STATES OF AMERICA
vs.
FRED L. COOKSEY.

Order Referring Cause to Master in Chancery.

Upon motion of R. T. Devlin, United States Attorney, and by consent of the attorneys for defendants, it was ordered that this suit be and the same

is hereby referred to H. M. Wright, Master in Chancery of this court, to take and return the evidence herein and report to the Court his findings of fact and conclusions of law thereon. [19]

At a stated term, to wit, the November term, A. D. 1912, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Thursday, the 7th day of November, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

United States of America vs.	E. L. Cooksey et al.	No. 15077.
United States of America vs.	John Huntington et al.	No. 15078.
United States of America vs.	J. Warren Stark et al.	No. 15079.
United States of America vs.	Leonard C. Remick et al.	No. 15080.
United States of America vs.	Andrew J. Isenberg et al.	No. 15081.
United States of America vs.	Gertie Terrell et al.	No. 15091.
United States of America vs.	Thos W. Burris et al.	No. 15092.
United States of America vs.	Ella J. Burris et al.	No. 15093.
United States of America vs.	Willard C. Brown et al.	No. 15094.
United States of America vs.	Minerva S. Brown et al.	No. 15095.
United States of America vs.	Chas. S. Pierce et al.	No. 15096.
United States of America vs.	Rebecca H. Heppe et al.	No. 15097.
United States of America vs.	Nancy Anderson et al.	No. 15098.
United States of America vs.	Henrietta Turnan et al.	No. 15099.
United States of America vs.	Leroy Benner et al.	No. 15100.
United States of America vs.	James L. Stark et al.	No. 15101.
United States of America vs.	Benj. F. Wardlaw et al.	No. 15102.
United States of America vs.	George A. Hall et al.	No. 15103.

United States of America vs. Della Hall et al. No. 15104.
United States of America vs. Reuben J. Mitchell et al. No. 15105.
United States of America vs. Willis Savercool et al. No. 15106.
United States of America vs. James Savercool et al. No 15107.
United States of America vs. Jacob S. Aid et al. No. 15108.
United States of America vs. Thos. L. Aid et al. No. 15109.
United States of America vs. Jos. Ogle et al. No. 15110.
United States of America vs. Jacob G. Hensley et al. No. 15111.
United States of America vs. Elijah Taylor et al. No. 15112.
United States of America vs. Robt. Chas. Taylor et al. No. 15113.
United States of America vs. Charles Moore et al. No. 15114.
United States of America vs. Chas. H. Butler et al. No. 15115.
United States of America vs. Geo. Marion Cooksey et al. No. 15116.
United States of America vs. Martha L, Zuschlag et al. No. 15117.
United States of America vs. Henry Clay White et al. No. 15118.
United States of America vs. Harty E. Johnson et al. No. 15119.
United States of America vs. Henry Morley et al. No. 15135.
United States of America vs. Mamie Ogle et al. No. 15136.
United States of America vs. James W. Rhodes et al. No. 15138.
United States of America vs. Pliny P. Hudson et al. No. 15153.
United States of America vs. James T. Taylor et al. No. 15154.
United States of America vs. Mollie Scott et al. No. 15155.
United States of America vs. Fred Scott et al. No. 15156.
United States of America vs. Edward Brase et al. No. 15157.
United States of America vs. Jack Perini et al. No. 15158.
United States of America vs. Herman Gartelman et al. No. 15159.
United States of America vs. James D. Baker et al. No. 15163.
United States of America vs. Mayme H. Baker et al. No. 15164.
United States of America vs. Ella E. Udall et al. No. 15165.
United States of America vs. Alex H. Anderson et al. No. 15166.
[20]
United States of America vs. Ella Spring et al. No. 15167.
United States of America vs. Carrie M. Allen et al. No. 15168.
United States of America vs. Roy Stark et al. No. 15169.
United States of America vs. Lorenzo A. Nisson et al. No. 15170.
United States of America vs. John H. Kelly et al. No. 15171.

United States of America vs. Arthur W. Savercool et al. No. 15172.
United States of America vs. S. G. Eastman et al. No. 15173.
United States of America vs. John L. Gray et al. No. 15174.
United States of America vs. I. M. Christensen et al. No. 15175.
United States of America vs. Robt. M. Cameron et al. No. 15176.
United States of America vs. Ira T. Johnson et al. No. 15177.
United States of America vs. Jos. I. Kelley et al. No. 15178.
United States of America vs. Emma L. Kelley et al. No. 15179.
United States of America vs. M. J. Self et al. No. 15180.
United States of America vs. John Vanornum et al. No. 15181.
United States of America vs. Margaret J. Baker et al. No. 15186.
United States of America vs. Geo. D. Gardenhire et al. No. 15187.
United States of America vs. Chas. J. Monroe et al. No. 15188.
United States of America vs. William J. Gardenhire et al. No. 15189.
United States of America vs. Chas. J. Allen et al. No. 15190.
United States of America vs. Mabel L. Chamberlain et al. No. 15191.
United States of America vs. Della P. Kelly et al. No. 15192.
United States of America vs. Frank E. Kruger et al. No. 15193.
United States of America vs. Lillian E. Savercool et al. No. 15194.
United States of America vs. John W. Aid et al. No. 15195.
United States of America vs. James D. Aid et al. No. 15196.
United States of America vs. Henry M. Smith et al. No. 15197.
United States of America vs. Roscoe C. Wilcox et al. No. 15198.
United States of America vs. Florence N. Wilcox et al. No. 15199.
United States of America vs. Carrie L. Ross et al. No. 15202.
United States of America vs. John Zuschlag et al. No. 15200

Order Consolidating Causes for Trial.

Good cause appearing therefor, it is hereby ordered that all of the above-entitled actions and cases be and the same are hereby consolidated for the purpose of trial. [21]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,077.

UNITED STATES OF AMERICA,
Complainant,

vs.

EDWARD L. COOKSEY et al.,
Defendants.

Amendment to Bill of Complaint.

Now comes James R. McReynolds, Attorney General of the United States, and John L. McNab, United States Attorney for the Northern District of California, for and on behalf of the United States, and by leave of Court first had and obtained, does hereby file its amendment to the bill of complaint in the above-entitled action by adding thereto paragraph 9½ as follows:

That by reason of the facts hereinbefore stated a fraud has been perpetrated on the complainant and it has been deprived of the legal title to the lands hereinbefore described, contrary to law and good conscience. That complainant had no knowledge of

the facts as hereinbefore set out and did not discover such facts until a long time after the issuance of the patent to said defendant Edward L. Cooksey herein. That the facts constituting said fraud as hereinbefore set forth did not become known to complainant until within six years immediately preceding the commencement of this suit nor until the 26th day of March, 1910, when the report of Don S. Rathbun, special agent of the General Land Office of the Department of the Interior of the United States, was filed with the Commissioner of the General Land Office of the United States, which said report was based upon a general investigation of charges of a great number of violations of the public land laws in the northern part of the State of California; that said general investigation commenced in December, 1907, but was not completed as to the entry herein involved until immediately prior to the making of said report to the Commissioner of the General Land Office, nor were the facts hereinbefore alleged as to the fraud in making said entry and acquiring said land discovered by said special agent until immediately prior to the completion of said investigation and the report thereon to the Commissioner of the General Land Office March 26, 1910. That the failure on the part of the United States to discover said facts constituting said fraud prior to the 26th day of March, 1910, was without any fault or want of diligence or care on the part of complainant; that said fraud and the acts constituting the same were concealed from said complainant by affirmative acts on the

part of defendants herein done for the purpose of concealing said fraud from said complainant and of preventing said complainant from discovering said fraud, in this, that said land was conveyed by said entryman to said Charles E. Gregory by a deed executed and delivered to agents of the defendant, [22] Curtis, Collins and Holbrook Company, for said Gregory on the 25th day of October, 1902, and which said deed was not filed for record in the office of the County Recorder of Plumas County, in which said land was situated, until the 10th day of September, 1904; that said land was conveyed by said Charles E. Gregory to said Curtis, Collins and Holbrook Company in a deed executed and delivered on the second day of May, 1903, and that said deed was not filed for record in the office of the County Recorder of Plumas County, until the 18th day of October, 1909. That said land was conveyed to said Charles E. Gregory upon a secret, fraudulent trust to hold the same for the benefit and accommodation of said defendant, Curtis, Collins and Holbrook Company, and that said Charles E. Gregory had no interest in said lands and did not know that he ever owned the same; that he paid no consideration for said lands, nor did he at any time receive any consideration for executing said deed to Curtis, Collins and Holbrook Company, but did the same at the request of said company; that said deeds from said entryman to said Charles E. Gregory and from said Charles E. Gregory to the Curtis, Collins and Holbrook Company at all times since the execution of said deeds have

been and now are in the actual control and in the physical possession of the agents of the defendant the Curtis, Collins and Holbrook Company, and that while said deed from said entryman was actually made to said Charles E. Gregory named as grantee, said deed was never delivered to the said Charles E. Gregory personally, but his name was inserted in said deed for the purpose of concealing the actual ownership of said land and the fact that the title to the same had fraudulently been acquired from your complainant.

JAMES R. McREYNOLDS,
Attorney General of the United States of America.

J. L. McNAB,
United States Attorney,
Solicitors for Complainant.

[Endorsed]: Received copy of within amendment of complaint this 5th day of April, 1913.

CHARLES A. SHURTLEFF,
J. G. DE FOREST,
Attorneys for Defendants.

Filed Apr. 5, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [23]

In the District Court of the United States in and for the Northern District of California, Second Division.

No. 15,077.

UNITED STATES OF AMERICA,
Complainant,

vs.

EDWARD L. COOKSEY, CHARLES E. GREGORY, and CURTIS, COLLINS and HOLBROOK COMPANY et al.,
Defendants.

Answer of Defendant Curtis, Collins and Holbrook Company to Complainant's Amendment to Its Bill of Complaint.

Now comes the above-named defendant Curtis, Collins and Holbrook Company and at all times hereafter saving and reserving to itself all manner of benefit and advantage and exceptions, or otherwise, which can or may be had or taken to the many errors, uncertainties and imperfections in said amendment to said bill of complaint contained, for answer thereto, to wit, to said amendment or to so much thereof as this defendant is advised is necessary for it to make answer, answering, respectfully shows to the Court and says: That said complainant is not by its said amended bill of complaint entitled to any equitable or other relief against this defendant Curtis, Collins and Holbrook Company, and that this defendant accordingly claims the benefit of the same objections to the said

amendment and to said amended bill of complaint which are made by its said answer to said bill of complaint, and this defendant renews and claims the benefits of all of the allegations, everments and statements contained in its said answer to said bill of complaint.

This defendant denies that by reason of the alleged facts heretofore stated in said bill of complaint or by reason of any fact or facts or otherwise or at all, a fraud has been or was perpetrated on said complainant, or that it, said complainant, has been deprived of the legal or any title to the land or any part thereof, described in said bill of complaint contrary to law and good conscience or contrary to law or good conscience, or otherwise or at all, except in accordance with law and good conscience.

And further answering said amendment to said bill of complaint this defendant denies that the said complainant had no knowledge of the alleged facts set out in said bill of complaint and did not discover such alleged facts until a long time after the issuance of the patent to said defendant Edward L. Cooksey herein.

And further answering said amendment to said bill of complaint and particularly the following allegations contained therein, to wit, that the facts constituting said alleged fraud as in said bill of complaint set forth, did not become known to the complainant until within six years immediately preceding the commencement of this suit nor until the 23d day of March, 1910, when the report of Don S. Rathbun, Special Agent for the General

Land Office of the Department of the Interior for the United States, was filed with the Commissioner of the General Land Office of the United States, which said report was based upon a general investigation of charges of a great number of violations of the public land laws in the northern part of the State of California; that said general investigation commenced in December, 1907, but was not completed as to the entry in said bill of complaint involved until immediately prior to the making of said report to the Commissioner of the General Land Office, nor were the facts in said bill of complaint alleged as to the fraud in making said entry and acquiring said land discovered by said special agent until immediately prior to the completion of said investigation and the report thereon to the Commissioner of the General Land Office March 23, 1910; and this defendant alleges that, except as to those matters in the answer of this defendant filed to said bill of complaint which are therein particularly denied or admitted, it has no knowledge concerning the matters contained in said last allegations, but this defendant upon its information and belief denies that the facts containing said alleged fraud set forth in said bill of complaint did not become known to said complainant until within six years immediately preceding the commencement of this action or until the 23d day of March, 1910, or when the said report of the said Don S. Rathbun, said special agent of said General Land Office of the Department of the Interior of the United States was filed with the Commissioner of the Gen-

eral Land Office of the United States, and denies upon such information and belief that said report was based upon a general investigation or any investigation of charges of a great or any number of violations of the public or other land [24] law in the northern or any part or portion of the State of California, and denies upon such information and belief that said general investigation commenced in December, 1907, or was not completed as to the entry in this action involved until immediately prior to the making of said report to the said Commissioner of the General Land Office, and denies upon such information and belief that the alleged facts alleged in said bill of complaint as to the alleged fraud in making said entry or in acquiring said land were not discovered by said special agent until immediately prior to the completion of said alleged investigation, or the report thereon, to the said Commissioner of the General Land Office on the 23d day of March, 1910.

And in this connection this defendant alleges and states upon its information and belief that said alleged facts alleged in said bill of complaint alleged to constitute fraud were known to said complainant long prior to the 23d day of March, 1910, and for more than six years prior to the commencement of this suit.

And this defendant further answering said amendment to said bill of complaint, upon its information and belief denies that the failure on the part of the United States to discover said alleged facts constituting said alleged fraud prior to the

23d day of March, 1910, was without any fault or want of diligence or care upon the part of said complainant.

And further answering said amendment to said bill of complaint this defendant denies that said alleged fraud or any of the acts alleged to constitute the same were concealed from said complainant by affirmative or other acts or any act or acts on the part of this defendant herein done for the purpose of concealing said alleged fraud from said complainant or of preventing said complainant from discovering said alleged fraud or otherwise or that said alleged facts were concealed at all by this defendant from complainant, in that said land was conveyed by the said entrymen to said defendant Charles E. Gregory by a deed executed or executed and delivered to the agents of this defendant for said Gregory on the 25th day of October, 1902, or at any other time or at all, and which deed was not filed for record in the office of the County Recorder of Plumas County, State of California, in which said land is situated until the 10th day of September, 1904. And this defendant denies upon its information and belief that said alleged fraud and the said alleged acts alleged to constitute the same, were concealed from said complainant by affirmative or any act or acts upon the part of the defendants Charles E. Gregory and the defendant Edward L. Cooksey, or either of them, done for the purpose of concealing said alleged fraud from said complainant, or of preventing said complainant from discovering said alleged fraud in this, that

said land was conveyed by said entrymen to said Charles E. Gregory by a deed executed and delivered to the alleged or any agent or agents of the defendant Curtis, Collins and Holbrook Company for said Gregory on the 25th day of October, 1902, or at any other time or at all, and which, or which, said deed was not filed for record in the office of the County Recorder of said Plumas County, in which said land was situated, until the 10th day of September, 1904, that said land was conveyed by said Charles E. Gregory to said defendant Curtis, Collins and Holbrook Company in a deed executed and delivered on the 2d day of May, 1903, and that said deed was not filed for record in the office of the County Recorder of Plumas County until the 18th day of October, 1909, and in this connection this defendant admits, that said land was conveyed by said entrymen to said Charles E. Gregory by deed, which said deed was executed and delivered to said Charles E. Gregory on the 25th day of October, 1902, and which deed was filed in the office of the County Recorder of said Plumas County in which said land is situated, on the 10th day of September, 1904, and that said land was conveyed by said Charles E. Gregory to the said Curtis, Collins and Holbrook Company by a deed executed and delivered on the 2d day of May, 1903, and filed for record in the office of the County Recorder of said Plumas County on the 18th day of October, 1909, and in that connection this defendant alleges that the failure to record said deeds and each of them at an earlier date than the date

upon which they were respectively recorded as aforesaid, was not due to, or done for the purpose of concealing any act or acts, matters or things whatsoever from the said complainant or preventing said complainant from discovering that said land had been conveyed as hereinbefore admitted, and that the said deeds were not, nor were either of them withheld from the records by this defendant or anyone representing it or acting for it, with the object or with the intent of defrauding the said complainant in any manner whatsoever. This defendant denies that said land was conveyed to said Charles E. Gregory upon or under a secret or fraudulent trust or any trust to hold the same or any part thereof for the benefit or accommodation of this defendant, and in this connection this defendant alleges that the said Charles E. Gregory held said land for Charles H. Holbrook, the same to be conveyed by the said Charles E. Gregory to such person or persons [25] as the said Charles H. Holbrook might direct, and that the said Charles H. Holbrook in securing and requesting said Charles E. Gregory to hold said land as aforesaid, did not in any manner or at all act as agent or agents of or represent this defendant. And in this connection this defendant further states that in truth and in fact said land was thereafter conveyed to this defendant upon the request and at the direction of said Charles H. Holbrook.

That this defendant alleges that it has no knowledge or remembrance touching the allegation in said amendment to said bill of complaint that the

said Charles E. Gregory had no interest in said land and did not know that he ever owned the same and did not pay any consideration for said land. Therefore, this defendant leaves complainant to make such proof as it shall be advised to sustain said allegations and each of them.

And further answering the said amendment to complainant's bill of complaint herein, this defendant, except as hereinafter alleged, denies that the said Charles E. Gregory did not at any time receive any consideration for executing said deed mentioned in said bill of complaint and in said amendment thereto, to this defendant, and in this connection this defendant alleges that the said Charles E. Gregory held the said land for the said Charles H. Holbrook and said land was conveyed by the said Charles E. Gregory at the request of said Charles H. Holbrook to this defendant pursuant to a contract and agreement entered into by the said Holbrook to convey the said property to T. D. Collins and J. G. Curtis, or such person or corporation as they might request or direct. And this defendant denies that it ever at any time requested the said Charles E. Gregory to convey said land to it, this defendant, except that upon payment for said land made by this defendant to said Charles H. Holbrook that this defendant became entitled thereto and to have the said Charles E. Gregory convey the same to it, this defendant.

And further answering said amendment to said bill of complaint this defendant, except as hereinafter alleged and stated, denies, that the said deed

from the said entrymen to the said Charles E. Gregory at all times since the execution thereof, has been in the actual control and in the physical possession of the agents of this defendant. And in this connection this defendant alleges that said deed from said entrymen to said Charles E. Gregory was not in the possession of this defendant or any agent or agents of this defendant until said deed executed by said Charles E. Gregory conveying said lands to this defendant was delivered to this defendant.

This defendant has no knowledge or remembrance touching the allegation contained in said amendment to said bill of complaint that the name of Charles E. Gregory was inserted in said deed mentioned in said bill and in said amendment thereto for the purpose of concealing the actual ownership of said land and therefore, and for that reason, defendant leaves complainant to make such proof as it shall be advised to sustain the last mentioned allegation, but this defendant alleges that if the said name of said Charles E. Gregory was inserted in said deed for the purpose of concealing the actual ownership of said land that it had no knowledge thereof and it denies having any knowledge thereof.

And further answering said amendment to said bill of complaint this defendant denies that the name of Charles E. Gregory was inserted in said deed mentioned in said bill of complaint and in said amendment thereto for the purpose of concealing that the title to said property had been fraudulently acquired from said complainant and

in this connection this defendant denies that the title to said property described in said deed had been or was fraudulently acquired from the said complainant.

And this defendant denies all, and all manner of unlawful combination, confederacy and conspiracy with which it is charged by said amendment to said bill of complaint or by said bill so amended and alleges that any other matter, cause or thing in said amendment to said complainant's bill of complaint alleged material or necessary for this defendant to make answer unto and which is not well and sufficiently answered is not true to the knowledge or belief of this defendant, all of which matters and things this defendant is willing and ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays to be dismissed with its reasonable costs and charges herein most wrongfully sustained.

CURTIS, COLLINS AND HOLBROOK COMPANY,

Defendant.

[Seal] By CHARLES A. SHURTLEFF,

Secretary.

CHARLES A. SHURTLEFF,

Solicitor and Attorney for Defendant Curtis, Collins and Holbrook Company.

CHARLES A. SHURTLEFF,

Of Counsel. [26]

Verification to the foregoing answer to the amendment to complainant's bill of complaint filed herein

is waived and admission of service to the foregoing answer by copy this day admitted.

Dated August 30, 1913.

JAMES C. McREYNOLDS,
Attorney General of the United States of America.

BENJ. L. McKINLEY,
United States Attorney,
Solicitors for Complainant.

[Endorsed]: No. ——. In the District Court of the United States, in and for the Northern District of California, Second Division. United States of America, Complainant, vs. ———, Charles E. Gregory, and Curtis, Collins and Holbrook Company et al., Defendants. Answer of Defendant Curtis, Collins and Holbrook Company to Complainant's Amendment to its Bill of Complaint. Filed Aug. 30, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the District Court of the United States in and for the Northern District of California, Second Division.

No. 15,077.

UNITED STATES OF AMERICA,
Complainant,

vs.

EDWARD L. COOKSEY, CHARLES E. GREGORY, and CURTIS, COLLINS and HOLBROOK COMPANY et al.,
Defendants.

Answer of Defendant Edward L. Cooksey to Complainant's Amendment to Its Bill of Complaint.

Now comes the above-named defendant Edward L. Cooksey, and at all times hereafter saving and reserving to himself all manner of benefit and advantage and exceptions, or otherwise, which can or may be had or taken to the many errors, uncertainties and imperfections in said amendment to said bill of complaint contained, for answer thereto, to wit, to said amendment or to so much thereof as this defendant is advised is necessary for him to make answer, answering, respectfully shows to the Court and says: That said complainant is not by its said amended bill of complaint entitled to any equitable or other relief against this defendant, and that this defendant accordingly claims the benefit of the same objections to the said amendment and to said amended bill of complaint which are made by his said answer to said bill of complaint, and this defendant renews and claims the benefits of all of the allegations, averments and statements contained in his said answer to said bill of complaint.

This defendant denies that by reason of the alleged facts heretofore stated in said bill of complaint or by reason of any fact or facts or otherwise or at all, a fraud has been or was perpetrated on said *complaint,* or that said complainant has been deprived of the legal or any title to the lands or any part thereof, described in said bill of com-

plaint contrary to law and good conscience or contrary to law or good conscience, or otherwise or at all, except in accordance with law and good conscience.

And further answering said amendment to said bill of complaint this defendant denies that the said complainant had no knowledge of the alleged facts set out in said bill of complaint and did not discover such alleged facts until a long time after the issuance of the patent to this defendant.

And further answering said amendment to said bill of complaint and particularly the following allegations contained therein, to wit, that the facts constituting said alleged fraud as in said bill of complaint set forth, did not become known to the complainant until within six years immediately preceding the commencement of this suit nor until the 23d day of March, 1910, when the report of Don S. Rathbun, Special Agent for the General Land Office of the Department of the Interior for the United States, was filed with the Commissioner of the General Land Office of the United States, which said report was based upon a general investigation of charges of a great number of violations of the public land laws in the northern part of the State of California; that said general investigation commenced in December, 1907, but was not completed as to the entry in said bill of complaint involved until immediately prior to the making of said report to the Commissioner of the General Land Office, nor were the facts in said bill of complaint alleged as to the fraud in making said entry

and acquiring said land discovered by said special agent until immediately prior to the completion of said investigation and the report thereon to the Commissioner of the General Land Office March 23, 1910; and this defendant alleges that, except as to those matters in the answer of this defendant filed to [27] said bill of complaint which are therein particularly denied or admitted, he has no knowledge concerning the matters contained in said last allegations, but this defendant upon his information and belief denies that the facts containing said alleged fraud set forth in said bill of complaint did not become known to said complainant until within six years immediately preceding the commencement of this action or until the 23d day of March, 1910, or when the said report of the said Don S. Rathbun, said special agent of said General Land Office of the Department of the Interior of the United States was filed with the Commissioner of the General Land Office of the United States, and denies upon such information and belief that said report was based upon a general investigation or any investigation of charges of a great or any number of violations of the public or other land office in the northern or any part or portion of the State of California, and denies upon such information and belief that said general investigation commenced in December, 1907, or was not completed as to the entry in this action involved until immediately prior to the making of said report to the said Commissioner of the General Land Office, and denies upon such information and be-

lief that the alleged facts alleged in said bill of complaint as to the alleged fraud in making said entry or in acquiring said land were not discovered by said special agent until immediately prior to the completion of said alleged investigation, or the report thereon, to the said Commissioner of the General Land Office on the 23d day of March, 1910, and for more than six years prior to the commencement of this suit.

And in this connection this defendant alleges and states upon his information and belief that said alleged facts alleged in said bill of complaint alleged to constitute fraud were known to said complainant long prior to the 23d day of March, 1910, and for more than six years prior to the commencement of this suit.

And this defendant further answering said amendment to said bill of complaint, upon his information and belief denies that the failure on the part of the United States to discover said alleged facts constituting said alleged fraud prior to the 23d day of March, 1910, was without any fault or want of diligence or care upon the part of said complainant.

And further answering said amendment to said bill of complaint this defendant denies that said alleged fraud or any of the acts alleged to constitute the same were concealed from said complainant by affirmative or other acts or any act or acts on the part of this defendant herein done for the purpose of concealing said alleged fraud from said complainant or of preventing said complainant

from discovering said alleged fraud or otherwise or that said alleged facts were concealed at all by this defendant from complainant, in that said land was conveyed by this defendant to said defendant Charles E. Gregory by a deed executed or executed and delivered to the agents of said defendant Curtis, Collins and Holbrook Company for said Gregory on the 25th day of October, 1902, or at any other time or at all, and which deed was not filed for record in the office of the County Recorder of Plumas County, State of California, in which said land is situated until the 10th day of September, 1904. And this defendant denies upon his information and belief that said alleged fraud and the said alleged acts alleged to constitute the same, were concealed from said complainant by affirmative or any act or acts upon the part of this defendant and the defendant Charles E. Gregory and the defendant Curtis, Collins and Holbrook Company, or either of them, done for the purpose of concealing said alleged fraud from said complainant, or of preventing said complainant from discovering said alleged fraud in this, that said land was conveyed by this defendant to said Charles E. Gregory by a deed executed and delivered to the alleged or any agent or agents of the defendant Curtis, Collins and Holbrook Company for said Gregory on the 25th day of October, 1902, or at any other time or at all, and which, or which, said deed was not filed for record in the office of the County Recorder of said Plumas County, in which said land was situated, until the 10th day of September, 1904,

that said land was conveyed by said Charles E. Gregory to said defendant Curtis, Collins and Holbrook Company in a deed executed and delivered on the 2d day of May, 1903, and that said deed was not filed for record in the office of the County [28] Recorder of Plumas County until the 18th day of October, 1909, and in this connection this defendant admits, that said land was conveyed by this defendant to said Charles E. Gregory by deed, which said deed was executed and delivered to said Charles E. Gregory on the 25th day of October, 1902.

That this defendant alleges that he has no knowledge or remembrance touching the allegations in said amendment to said bill of complaint that the said deed so executed and delivered by this defendant to said Charles E. Gregory as aforesaid was not filed for record in the office of the County Recorder of Plumas County, in which said land was situated, until the 10th day of September, 1904; that said land was conveyed by said Charles E. Gregory to said Curtis, Collins and Holbrook Company in a deed executed and delivered on the 2d day of May, 1903, and that said deed was not filed for record in the office of the County Recorder of Plumas County until the 18th day of October, 1909. That said land was conveyed to said Charles E. Gregory upon a secret, fraudulent trust to hold the same for the benefit, and accommodation of said defendant, Curtis, Collins and Holbrook Company, and that said Charles E. Gregory had no consideration for said lands, nor did he at any time receive

any consideration for executing said deed to Curtis, Collins and Holbrook Company, but did the same at the request of said company; that said deeds from this defendant to said Charles E. Gregory and from said Charles E. Gregory to the Curtis, Collins and Holbrook Company at all times since the execution of said deeds have been and now are in the actual control and in the physical possession of the agents of the defendant the Curtis, Collins and Holbrook Company, and that while said deed from this defendant was actually made to said Charles E. Gregory named as grantee, said deed was never delivered to the said Charles E. Gregory personally, but his name was inserted in said deed for the purpose of concealing the actual ownership of said land and the fact that the title to the same had fraudulently been acquired from your complainant.

Therefore this defendant leaves complainant to make such proof as it shall be advised to sustain said allegations and each of them.

And this defendant denies all, and all manner of unlawful combination, confederacy and conspiracy with which he is charged by said amendment to said bill of complaint or by said bill and alleges that any other matter, cost or thing in said amendment to said complainant's bill of complaint alleged material or necessary for this defendant to make answer unto and which is not well and sufficiently answered is not true to the knowledge or belief of this defendant, all of which matters and things this defendant is willing and ready to aver, maintain and prove as this Honorable Court shall

direct, and humbly prays to be dismissed with his reasonable costs and charges herein most wrongfully sustained.

J. G. DE FOREST,

Solicitor and Attorney for said Defendant, Edward L. Cooksey.

J. G. DE FOREST,

Of Counsel. [29]

Verification to the foregoing answer to the amendment to complainant's bill of complaint filed herein is waived and admission of service to the foregoing answer by copy this day admitted.

Dated Aug. 30, 1913.

JAMES C. McREYNOLDS,

Attorney General of the United States of America.

BENJ. L. McKINLEY,

United States Attorney,

Solicitors for Complainant.

[Endorsed]: No. ——. In the District Court of the United States, in and for the Northern District of California, Second Division. United States of America, Complainant, vs. ———, Charles E. Gregory, and Curtis, Collins and Holbrook Company et al., Defendants. Answer of Defendant ——— to Complainant's Amendment to its Bill of Complaint. Filed Aug. 30, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the District Court of the United States, Northern District of California, Second Division.

(Formerly)

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

IN EQUITY—No. 15,077.

UNITED STATES OF AMERICA,
Complainant,

vs.

EDWARD L. COOKSEY, CHARLES E. GREGORY, CURTIS, COLLINS & HOLBROOK COMPANY, a Corporation, et al.,
Defendants.

Report of H. M. Wright, Standing Master in Chancery on Final Hearing.

To the Honorable, the Judges of the Above-entitled Court.

The report of H. M. Wright, Standing Master in Crancery of the United States District Court for the Northern District of California, formerly Standing Master in Chancery of the United States Circuit Court, Ninth Circuit, Northern District of California, respectfully shows:

The bill of complaint herein was filed on June 7, 1910.

On May 1, 1911, the said Circuit Court made its order as follows:

"Upon motion of R. T. Devlin, United States Attorney, and by consent of the attorneys for

defendants, it is ordered that this suit be and the same is hereby referred to H. M. Wright, Master in Chancery of this Court, to take and return the evidence herein and report to the Court his findings of fact and conclusions of law thereon."

A certified copy of the order of reference is annexed to this report.

On November 7, 1912, the said Court made its order consolidating for trial this cause and seventy-eight other causes of like character against different defendants entrymen, all, however, having [30] as a common defendant Curtis, Collins & Holbrook Company, a corporation, the owner of the lands affected by these suits. Causes having the following numbers were affected by said order of consolidations: Nos. 15,077 to 15,081, both inclusive, 15,091 to 15,119, both inclusive, 15,135, 15,136, 15,138, 15,153 to 15,159, both inclusive, 15,163 to 15,181, both inclusive, 15,186 to 15,200, both inclusive, and 15,202.

My plan of making reports in this matter will be to present my views on all issues in this report in the case of United States of America vs. Edward L. Cooksey et al., and file separate reports in the other cases. These separate reports will incorporate by a reference such portions of this report as have a common bearing and will only contain in addition the discussion of matters peculiar to the individual cases and findings and conclusions therein.

The consolidated cause was called for hearing be-

fore me on November 8, 1912, and evidence was taken at various times thereafter until September 29, 1913; then after several days' oral argument it was submitted for decision. Earl H. Pier, Esq., Assistant United States Attorney, appeared for the complainant, Charles A. Shurtleff, Esq., appeared for defendant Curtis, Collins & Holbrook Company and certain other defendants, and J. G. De Forest, Esq., for defendant Cooksey and the entrymen defendants in the other cases in the consolidation. The oral testimony and proceedings were taken down in shorthand and transcribed by E. W. Lehner, a competent and disinterested reporter appointed by the Master upon consent of the parties, and said transcript contained in 60 volumes, including the oral argument, is herewith separately returned. All witnesses produced were by me first sworn to testify the truth, the whole truth, and nothing but the truth in said cause, and the said transcript of their testimony and of the proceedings of said consolidated cause is a true transcript. In addition to said oral testimony documentary exhibits were received in evidence and by me marked and numbered as follows: Complainant's Exhibits 1 to 81, both inclusive, Exhibit 92, and Maps 1 to 5, both inclusive. Many documentary exhibits offered and marked are not returned by reason [31] of the fact that they were copied at large into the said transcript of the proceedings. Said exhibits not so copied into the transcript are herewith separately returned. Said transcript and said exhibits constitute all the evidence in said consolidated

cause. It will be noted that said transcript is entitled and said exhibits are marked by the title "United States of America vs. Joseph I. Kelley et al., and 78 consolidated cases, No. 15,178." This is the title of one of the causes so consolidated selected for the reason that Kelley was the first defendant called as a witness. I have selected the case against Cooksey as the case in which the main report shall be filed for the reason that all the issues are here involved and this cause is the one in which the first complaint was filed.

The plan of the report will be as follows:

1. A consideration of the Timber and Stone Act and a general review of reported decisions of the courts and of the land office pertinent to the questions here involved.

2. A summary of the pleadings, together with a report on the motion by the Government to amend its complaint.

3. The facts common to all the cases, together with reference to certain rulings on evidence and the like.

4. The facts of Cooksey's entry and findings on the question of fraud therein.

5. The facts and findings on the defense of purchase for value without notice.

6. The facts and findings on the defense of the statute of limitations.

7. A summary of findings and conclusions as to the Cooksey entry.

It will be seen that the report will conceivably go further than necessary to decide the case, since,

for example, a finding on the question of either of the affirmative defenses would make unnecessary a consideration of the question of fraud in the entry. It has been my custom, however, in reporting to the Court to report on all issues presented so that no reference would be necessary. That portion [32] of the report on the adjudicated cases will undoubtedly seem unnecessarily long, especially in view of my conclusion as to the scope of the pleadings. If I were writing the opinion of the court the matter might be more briefly disposed of, but what I conceive the Court will find most valuable will be an exposition of the matter such as will make unnecessary a resort by the Court to a reading of the original sources. [33]

REVIEW OF DECISIONS AS TO FRAUDULENT TIMBER AND STONE ENTRIES.

The Timber and Stone Act of June 3, 1878, provides in its first section the qualifications of entrymen and restricts the amount that may be entered to one hundred and sixty acres for "any one person or association of persons." In its second section it sets forth as the procedure necessary to make entry the filing in the land office of a written statement in duplicate under oath, describing the land which the applicant desires to purchase and its quality, that he has made no other application under the act;

> "that he does not apply to purchase the same on speculation, but in good faith, to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract in any way or manner

with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself."

The section then provides that if he swears falsely in this application he shall be guilty of perjury and shall forfeit the money paid for the land and all right and title to the same, and that "any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void." The third section provides that, on the filing of the applicant's sworn statement, the register shall post a notice thereof for a period of sixty days, and shall furnish the applicant a copy of the notice for publication in a newspaper nearest the premises for a like period of time; that after the expiration of sixty days, if no adverse claim has been filed, the applicant shall furnish the register of the land office satisfactory evidence, first, of the publication required; second, that the land is valuable chiefly for timber, is unfit for cultivation, that it is unoccupied and without improvements, that it apparently contains no valuable deposits of gold or other minerals, and thereupon, upon payment to the proper officer of the purchase money of said land at two dollars and fifty cents per acre, together with the fees of the register and the receiver, "the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent [34—1] shall issue thereon." It further provides that any person

having a valid claim to any portion of the land may object in writing to the issuance of a patent, stating the nature of his claim, whereupon evidence is to be taken and the merits of the objection determined by the officers of the land office, subject to appeal, as in other cases.

Bearing in mind that it was determined in United States vs. Williamson, 207 U. S. 425, that land entered under this act may be sold by the entryman at any time after making his sworn application, though before final proof, and that a false statement as to a sale or an agreement for sale existing at the time of final proof is immaterial, it is apparent that questions of fraud upon the Government, except in the particulars referred to in section three as to final proof, must arise in connection with the truth or untruth of the statements made in the sworn affidavit provided for in section two. So far as these cases are concerned, the questions arise under the paragraph above quoted.

In a decision, which, so far as pointed out to me, is the first judicial interpretation of this act (United States vs. Budd, 43 Fed. 630, rendered in 1890), Judge Hanford said of the statute:

> "This statute does not, by its terms, assume to obligate a person who acquires a title to land under it to keep the land, or to control his use or right to dispose of it for any period of time after he shall have complied with its provisions in perfecting his right to it. It only requires good faith on the part of the purchaser, and it is intended to prevent the acquisition of land

from the United States at a wholesale rate by individuals or corporations, by using individual persons, who do not acquire it of their personal volition, but simply as mediums for the transmission of titles from the Government to land-grabbers; and to effect this object the law goes no further than to prohibit entries by persons who have, prior to the filing of their applications, bound themselves by contracts."

If the learned Judge is right, it would seem that the first part of the quoted portion of the act referring to speculation might as well have been omitted by Congress; and it will upon reflection further appear that if it is only the existence of prior contracts to sell the entered lands that is obnoxious to the law, then its intent as set forth, namely, to prevent the engrossment of the [35—2] public lands, may easily be defeated by methods which avoid the incurring of contractual relations, express or implied. That is to say, entries can be encouraged or induced with such skill that a contract cannot be implied, and under circumstances where a subsequent purchase is likely to be the result. The views expressed by Judge Hanford were later repeated, in effect, by the Supreme Court, and the idea that only an antecedent contract can vitiate a timber and stone entry has dominated so many of the decisions, that it might reasonably be concluded that it represented a final determination of the proper interpretation of the legislation in question. And yet throughout this litigation so strong has been the impression made upon me that such a view did not give full scope to the

intent of Congress, that I deem it necessary, at the risk of being tedious, to treat it, first, as a new question, and then to determine by a review of all the decisions to what extent the law has been settled.

The act must, of course, be construed as it is written. And while the debates in Congress may not be appropriate sources of information from which to discover the meaning of the statute (United States vs. Trans-Missouri Freight Assn., 166 U. S. 290-318), they may properly furnish information of the exigencies that pressed upon Congress the passage of the act. (American Net & Twine Co. vs. Worthington, 141 U. S. 473; Holy Trinity Church vs. The United States, 143 U. S. 463.) An examination of the Congressional Records discloses that various bills embodying the identical provision under discussion were introduced in Congress, in the forty-third, forty-fourth and forty-fifth Congresses, beginning on December 8th, 1873, but never were finally passed. Senate Bill No. 6 was introduced by Senator Kelly of Oregon in December, 1875; it finally came up for debate in February, 1876 (Vol. 4, page 2; Rec. of 44 Cong., first session, pp. 1100 et seq.) It required the same entryman's oath as in the section of the present law under examination except that the entryman was required to swear not only that [36-3] he was applying to purchase the land in good faith, to appropriate it to his own exclusive use and benefit, but is also added the words "and not for sale." It was pointed out in the debate that followed that in California, Oregon, Washington, and the Territories, the timbered lands were largely under Gov-

ernment ownership, that the only laws whereby they could be entered by private persons were the Homestead Law and the Pre-emption Law, both of which required residence as a condition of purchase; that much of the timber was in the Sierras, where honest residence was impossible; that nevertheless individual settlers needed wood for their fires and lumber for their fences and their homes, that the cities were built of wood, and that the mining industry and the smelters required timber to conduct their mining operations and smelt their ores, and that the exigencies of the community had resulted in depredations upon the Government land, unrestrained theft of its timber, or fraudulent homestead or pre-emption entries. Senator Kelly said:

> "The purpose of this bill is to do away with these trespasses upon the public domain, so that persons may acquire title without residence, and have an interest in the timber lands, and protect them from destruction and protect them from trespass."

It was suggested by Senator Ingalls and Senator Sherman that speculators would take advantage of the bill to acquire large tracts of timber land. Senator Sargent of California replied (Vol. 4. p. 1101, Cong. Rec.):

> "If the machinery of the bill can in any way be guarded so that speculators cannot take advantage of this law if we pass it, I shall be very glad to have that done. Nearly the whole bill is taken up with provisions hedging in opportunities for speculators to avail themselves of its

provisions to acquire large tracts of *lander* under it. * * * This is hedged around by oaths and papers and documents in every form which careful ingenuity can provide. * * * While I would desire that there be an opportunity for our people honestly to carry on this business, I do not wish this land to be absorbed by speculators. * * * That is to say, there are two things (in the affidavit): In the first place, no speculation whatever moves him in this matter, and, in the next place, the title is entirely for his own use."

Senator Sherman believed that the land should be sold for the [37—4] purposes of public revenue without restrictions. He said: "A speculator can ride through this bill with a coach and four without any difficulty." He pointed out that under the bill a corporation, which as a matter of economic necessity would need more than one hundred and sixty acres on which to do its business, could settle its agents on the land, who, by making a contract to sell the timber and not the land to the company, could make the necessary oath without even swearing falsely. (It is to be noted that this same arrangement was shown by the facts in the Detroit Lumber Company case, *infra*, and by the Supreme Court declared to be obnoxious to the law.) In a subsequent debate (p. 1188) Senator Sargent again spoke in favor of the bill and objected to public sale by competitive bids on the ground that combinations would be made which would result in a monopolizing of the lands; that California had had enough of

monopoly and of large land holdings. Referring to the clause protecting a *bona fide* purchaser, he said: "You cannot pass any law to restrain alienation after the Government has absolutely parted with the title. * * * It is simply to protect innocent purchasers and not *participes criminis.*"

Senate Bill No. 6 passed the Senate February 21, 1875 (p. 1196, Cong. Rec.), but did not become a law at that session. In the next session it was introduced as Senate Bill No. 926, with the exception that in the latter bill the entryman is not required to swear as part of his application that he does not intend to sell the land. In that form the bill passed both houses, and was signed by the President June 3, 1878.

From this debate it is fair to say that what Congress had in mind was, first, to give the right to individual entrymen to enter one hundred and sixty acres of land valuable for timber or stone and for nothing else, and, second, to prevent the engrossment of the public lands in large holdings.

Let us examine the words of the statute to see what intent [38—5] if there expressed. It consists of two clauses separated by a semicolon. The first is, "that he does not apply to purchase the same on speculation, but in good faith, to appropriate it to his own exclusive use and benefit." A purpose to appropriate a piece of land to one's exclusive use and benefit seems in the natural meaning of the words to imply that the entryman will himself have use for the timber either by getting his lumber or firewood from it for his own use, or possibly by erecting a saw-

mill and manufacturing the timber into lumber. This would seem to meet the necessities suggested by the debate, the avoidance of unauthorized cutting by trespass on the public domain and of perjured homestead or pre-emption entries. If it be objected to this conclusion that, since it is an economic necessity to have lumber-mills and an economic fact that such mills cannot be operated on a holding of one hundred and sixty acres, Congress must have anticipated that the land could be taken up to be sold to such companies, it must be answered, first, that such is not the natural meaning of the words "own exclusive use and benefit," and, second, that that contingency was suggested by Senators objecting to the bill as the natural result of its enactment and the reply made that the bill was framed so as to guard against such contingencies. Senator Sherman said (p. 705 et seq) that the act was an encouragement to perjury. We are not concerned with the wisdom of the legislation in not providing for large holdings. The law must be construed as it is written.

This conclusion that the law was intended to provide for the individual timber uses of entrymen, and not intended to enable him to make a profit in the public timber lands by entering a tract for the purpose of sale, is reinforced when we examine the first part of the clause under consideration, namely, "that he does not apply to purchase the same on speculation." Speculation is a word difficult to define. It is defined by Webster as "the act or practice of buying land, goods, shares, [39—6] etc., in expectation of selling at a higher price." In ordinary com-

mercial usage it implies a certain amount of risk as opposed to an investment, and also the idea of a rather quick resale and of considerable profit to counterbalance the unusual risk.

The second part of the applicant's oath, providing that no agreement or contract should be made directly or indirectly, in any way or manner, whereby the title he might acquire would inure in whole or in part to another than himself, seems to need no interpretation except to point out that it may be either express or implied, and obviously, to give the law effective meaning, need not comply with the statute of frauds requiring a writing. But it is to be observed that this clause expresses a different idea in one respect from that in the first clause, since the idea of speculation to the extent that the word implies risk is opposed to the certain arrangements implied in the word contract. If a contract has been made, and to the extent that a contract has been made, the entry is not speculative nor uncertain in its results, and therefore both parts of the oath should be given full effect. I think, however, that this idea should not be pushed too far; that what was in the mind of Congress and was expressed by the Act by the word "speculation" was the opposite of taking up land for one's own use and benefit; that is, taking it up with the intent of holding it for sale. In other words, a man under this interpretation, which I think is the natural one, violates the law if he takes up a piece of timber land intending to sell it to someone else and not to apply it to his own uses, whether he has made a contract or not; and, secondly, that if

he has contracted to sell it or to sell any interest in it, or to burden it in any way whereby the benefit of the timber land shall inure to someone else, he is likewise violating the act.

It is not contended that the act forbids sale after the title is acquired. When the title has once passed from the Government, even where a restricted holding is allowed, the sale is good.

(St. Louis R. R. Co. vs. Kemp, 104 U. S. 636–654.) [40—7]

And the possibility of sale is evidenced in the words of the act itself which protects the title of a *bona fide* purchaser. A change of mind may obviously occur; one intending to take land for his own use may after filing his sworn affidavit decide to sell, or may use it for a time and desire to profit by what is left if his holding. This the statute does not forbid. The distinction which I think has been lost sight of in the decisions is that while the act does not prohibit sale, it does by implication prohibit entering *with intent to sell,* since such an entry is speculative and not intended for the entryman's own exclusive use and benefit. Had this distinction been clearly kept in mind at all times, engrossment of the public lands by large private interests, which is a matter of history, would not have taken place in the same degree in which it now exists. Furthermore, the solution of difficulties presented by litigation like the present, would have been rendered easy. With these observations I pass to a consideration of the reported decisions.

The case of The United States vs. Budd in the

lower court before Judge Hanford has already been adverted to. The matter came before the Supreme Court and was decided in 1882, 144 U. S. 154, the opinion being delivered by Judge Brewer, Justices Harlan and Brown dissenting. The bill charged an agreement prior to entry by Budd to transfer the title to one Montgomery after final proof. Neither Budd nor Montgomery took the stand but filed sworn answers denying the fraud, and since the bill did not waive a verified answer the answers became evidence under the rule in chancery. The Government offered no evidence except the fact that the deed to Montgomery ensued a short time, about three weeks, after final proof, and also inferences to be drawn from other transactions in evidence which went to show that Montgomery had induced other persons to take up land under an agreement whereby he was to purchase their lands after final proof. Judge Brewer repeated the doctrine in the Maxwell Land [41—8] Grant decision, and stated that that doctrine had here particular cogency by reason of the fact that the money which the Government had received from the land was under the timber and stone act required to be forfeited if the patent was cancelled. He pointed out the state of the evidence, said that there was no direct testimony of any agreement, or that Budd and Montgomery had ever met or knew of each others's existence; he said that under the stringent requirements as to the evidence necessary to cancel a patent the inferences to be drawn from other transactions, though admissible in evidence, were not of sufficient weight to overcome the sworn denial of Budd and

Montgomery; that they were only sufficient to raise a suspicion. In so deciding he used the following language (p. 163) which has been quoted in nearly every case since that time:

> "It (the evidence) simply shows that Montgomery wanted to purchase a large body of timber lands and did purchase them. This was perfectly legitimate and implies or suggests no wrong. The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the Government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, the acting for another in the purchase. If when the title passes from the Government no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied. Montgomery might rightfully go or send into that vicinity and make known generally, or to individuals, a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the Government; and any person knowing of that offer might rightfully go to the land office and make application and purchase a timber tract from the Government, and the facts above stated point as naturally to such a state of affairs as to a violation of the law by definite agreement prior to any purchase from the Government—point to it even more naturally, for no man is presumed to do wrong or to violate the law, and every man is presumed to know the law. And in this respect the case does

not rest on presumptions, for the testimony shows that Montgomery knew the statutory limitations concerning the acquisition of such lands, and the penalties attached to any previous arrangement with the patentee for their purchase."

Judge Brewer finally held that special effect must be given to the sworn denials of Budd and Montgomery, in view of the fact that the Government had not called them to the stand, which was its right, and that it must be presumed from this that their evidence would be [42—9] unfavorable to the Government's case.

Upon this decision I make the following comment: If the Supreme Court correctly states the law in the portion quoted, it must be obvious that the law is violated only when an agreement made prior to entry exists for the sale of the land after entry. The objection is obvious, first, that it renders nugatory that portion of the entryman's oath which requires him to state that he does not enter the land on speculation, but in good faith, for his own exclusive use and benefit; it gives effect only to that part of the act which forbids the prior contract. In the second place, it makes possible the acquirement of large tracts of land by these means, providing only the person desiring these lands is clever enough to avoid contracting for them. It must be observed, however, that though freighted with all the weight which an utterance of the Supreme Court must carry, the matter quoted was not necessary to the decision. The Court had already pointed out that the bill charged a prior agreement, and that the Government's proof

failed to establish the existence of such an agreement. The decision was plainly right. The proof consisted of mere inferences and suspicion, which is not sufficient to set aside a patent.

I next come to a series of decisions which strangely enough have been overlooked in subsequent reported cases, and were not cited in the case at bar. These are the cases concluded finally by the decision in Hawley vs. Diller, 178 U. S. 476, decided in 1900. There, at page 490, Justice Harlan speaking for the court, approved an opinion previously rendered by the Secretary of the Interior of the United States vs. Bailey, 17 Land Dec. 468. It accordingly becomes necessary to examine this decision.

This case of United States vs. Bailey, was decided October 19, 1893, by Secretary of the Interior Smith.

Twelve entries under the timber and stone act were by stipulation [43—10] of the parties tried together. The facts are stated at great length. I quote only the Secretary's conclusions. The fraud charged was that the entries were made at the instance and for the benefit of Stephen S. Bailey and J. Theodore Lohr. The Secretary stated (p. 475):

> "At every point Mr. Bailey appears; the conveyances were made to him very shortly after the entries were made; he advanced the money to make the entries in most, if not in all the cases; * * * Lohr was to select the lands, find the persons to make the entries, locate them thereon, and Bailey was to pay the expenses; upon the purchase of the land Bailey was to receive a deed for the tract and Lohr and Bailey

were to divide the profits between them (p. 476). Lohr picked up clerks, bar-tenders, grocery-men, school teachers, lawyers, in a word, anybody who was willing to make the location, or be concerned in it, for a consideration. They were mostly young men without any permanent abiding place. It is very strange, indeed, if they entered that land for their exclusive use and benefit, that they should have conveyed it to Mr. Bailey on the same day that the entries were made, or within a day or two thereafter, when the evidence shows that he was engineering these entries from the time the parties made the first affidavit until they submitted their final proof in support of their entries. It is very plain to my mind that this was a scheme put up in the first instance by Lohr and Bailey for the purpose of acquiring title to the land for speculative purposes. To my mind this raises an impassable barrier, if the law is to be observed, to the sustaining of these entries.

"The purpose and intent of the act was to give every citizen of the United States * * * an opportunity to purchase one hundred and sixty acres of land under said act. * * * This holding in no wise conflicts or interferes with the right of a purchaser in good faith of land under the act after he acquires title to sell the land if he desires to do so. Sales made soon after purchase, however, if unexplained, have a tendency to arouse suspicion in the mind that when the entry was made, it was not for the entryman's

own exclusive benefit and use. And when we find twelve entries made in the manner in which these were made, money furnished by the assignee, and this arrangement made prior to the time the locations were made, I do not see any escape from the conclusion that they were made in violation of the statute and ought not to stand."

The Secretary then referred to the decision of the Supreme Court in United States vs. Burr, and distinguished it on several grounds. (1) That a stronger case of fraud is required after patent; (2) that the answers of Budd and Montgomery denying the fraud were evidence; (3) that the elimination of evidence of other transactions left the Government with practically no evidence; (4) that the Court in the Budd case drew unfavorable inferences from the [44—11] failure of the Government to produce the transferee and the entrymen, whereas in the case of Bailey the Government could not compel his attendance and Bailey should have appeared voluntarily; (5) that in the Budd case the only matter considered was whether the entry of Budd was made in collusion with or in the interest of Montgomery, and that the bill in that case charged a prior agreement. The Secretary said:

"The question as to whether Budd's entry was made in good faith to appropriate it to his own use and benefit and not *on speculation* appears not to have been in issue."

The Secretary said further (p. 479):

"Now, if it should be conceded in the cases before me that the testimony of Lohr is insufficient to show that these several entries were made in the interest of or in collusion with Bailey, it seems to me the conclusion cannot be avoided that they were made on speculation, and not in good faith to appropriate the lands thus entered to the exclusive use and benefit of the several entrymen. Lohr shows by his testimony that these several entrymen were engaged in different pursuits and were induced by him to make these purchases, he telling them that he would buy their claims and give them $50 more than anyone else would; that this promise was made to the parties as an inducement to take his word and knowledge as to quality and quantity of the timber, and that while he does not remember loaning any of these entrymen money, yet it is probable he did; that when he did so, he sometimes took notes and sometimes trusted to their honor. By this and other similar testimony he leaves no doubt in my mind that he procured these entries to be made purely on speculation; that none of these entries were made for the purpose of appropriating the land or timber to the use of the entrymen, but on the promise or representations of Lohr that such act on their part would result in a profitable speculation—that is, they would be able to made an immediate sale of the land at a price greatly in excess of the cost to the entrymen. Entries made in this way and for this purpose

are in violation of the spirit and letter of the law; for the applicant to purchase is required to make affidavit that 'he does not apply to purchase the same on speculation.' This interpretation of the Statute does not imply that a timber land entryman is not authorized to sell his entry at any time he may choose after he has made his proof and received his certificate; *but when, as in these cases, it is clearly shown that prior to taking any steps to secure the land, they had first satisfied themselves that these entries could be sold at a profit, and thereupon they made their entries for the sole purpose of securing the profit thus in view,* to my mind they bring themselves within the inhibition of the statute. Mr. Bailey's connection with these purchases may be eliminated from the case, and the acts and motives of the entrymen alone considered, and their entries cannot be sustained, if any meaning is to be given to that part of the statute which prohibits the making of such entries 'on speculation.' I am aware that in the case of the United States vs. Budd, the Court used language indicating that nothing short of an actual prior agreement to sell can disturb the entry. But it must be remembered that in that [45—12] case 'a prior agreement to sell' was the sole issue of fraud on trial, and when Justice Brewer announced that 'all it (the law) denounces is a prior agreement,' etc., the language must be considered with reference to the matter at issue—namely,

whether there was such an agreement between Budd and Montgomery. Here the Government is inquiring into all matters connected with these entries, and is not limited, as in that case, to the issues made by the pleadings." (Italics, mine.)

I come next to Diller vs. Hawley, 81 Fed. 651, a decision of the Circuit Court of Appeals of the Ninth Circuit, in 1897, Judge Hawley delivering the opinion of the Court. Hawley, complainant below, was a purchaser from one of the entrymen whose entry was cancelled by the Secretary of the Interior in the case of United States vs. Bailey. After cancellation Diller entered the land and finally received the patent and Hawley brought a bill to declare title in trust. Judge Hanford gave a decree for the complainant on the ground that Hawley was a *bona fide* purchaser from the original entryman. The Court of Appeals considered whether the Secretary, admitting his facts as conclusive, had erred as a matter of law in concluding therefrom that the entries were fraudulent, or in his construction or interpretation of the law. The Budd case was reviewed and the Court say that that case was disposed of on the familiar principle of the Maxwell case, that the bill particularly charged and relied on a prior agreement, and that the evidence failed to establish this charge. Judge Hawley (p. 658); referring to the Supreme Court's opinion in the Budd case, said:

"The Court, in the course of its opinion, said that all that the act 'denounces is a prior agree-

ment, the acting for another in the purchase. If when the title passes from the Government, no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied.' This language should be construed with reference to the particular charge made by the pleadings in that case. *We are of opinion that it was not intended by the Court to apply to all the provisions of the act contained in section two.* It must be clearly and convincingly shown that the Secretary of the Interior acted without authority of law, or that he erred in his judgment as to the legal construction of the act. *We are of opinion that the evidence upon which the Secretary of the Interior acted was sufficient to justify the inference that there was some prior understanding,* although not directly shown, between Hackley, the entryman, and Lohr, acting with and for Bailey, that his acts should inure to their benefit, and that he applied to purchase the land on a speculation and not "in good faith to appropriate it to his own exclusive use and benefit'; and that such acts are as much in violation of the statute as if the entryman had directly made a contract in writing with a person by which the title which he might acquire from the Government should inure to such person; and that [46—13] the facts elicited upon the trial of this case in the Circuit Court are not of such a character as to authorize the Court to enter a decree in favor of appellees herein."

This case went to the Supreme Court and is there reported under the title of Hawley vs. Diller, 178 U. S. 476, decided in 1909, Justice Harlan writing the opinion. The decision of the Circuit Court of Appeals of this Circuit was affirmed. The greater part of the opinion was taken up with a consideration of the doctrine of *bona fide* purchase as applied to equitable titles where a patent had not issued. But among other things, Justice Harlan, speaking for the court, said (p. 490):

> "But there was no misconstruction of the law by the Land Department. Upon the facts found, no other conclusion could properly be reached than the one indicated by the opinion of the Secretary of the Interior (U. S. vs. Bailey, 17 Land Dec. 468), namely, that the original entry of the land was in violation of the act of Congress."

Upon this series of decisions I make the following comment. Both the Secretary of the Interior and the Circuit Court of Appeals of this Circuit seem to have disapproved the broad language of the Budd decision, and point out that it must be understood with reference to the facts of that particular case. The Secretary cancelled the entries on the ground that though the contract to convey had not been proved, the entries were speculative; that is to say, they had been induced and assisted under the expectation on the part of the entrymen that they would sell later to the parties thus assisting them, although not contracting; or speaking otherwise, that they were speculative because the entry-

man entered with a purpose to sell to secure a profit which he had first satisfied himself was definitely "in view."

Judge Hawley does not find a contract but an understanding. The cases are important in so far as they point out that full effect need not be given to the language in the Budd case and that a contract need not be made out. The Secretary seems to believe that such entries must be made for the exclusive use and benefit of the entrymen; but he does not take the broad ground that the mere fact that an entry is made for the purpose and with a formed intent to sell is sufficient to invalidate it. The opinion [47—14] of the Secretary, and, in so far as it approves that opinion, the decision of the Supreme Court, gives a certain degree of definiteness to the theory of "speculation" as ground for cancelling patents. Judge Hawley's opinion, from its use of the word "understanding" seems rather to the effect that under the circumstances there shown, an agreement would be implied. All the opinions lend a certain force to the theory that an entry is speculative when an agreement or "understanding" may be implied.

I next consider an opinion of Secretary Hitchcock rendered December 10, 1903, in the case of Annie M. Donahue, 32 L. D. 349. The opinion is of importance as a development of the judicial history of this act and has additional influence by reason of the fact that it is initialed by the same subordinates that wrote the opinion in United States vs. Bailey, though the Secretary was not the same.

Fifteen entries were involved. The facts will sufficiently appear from the opinion. The Secretary first considered the meaning of the term "speculation," quoting from various dictionaries and said (Italics mine):

> "In all the definitions there is more or less prominent, persistent and common the elements of sudden fluctuations in value, liability of loss by depreciation, and contemplated brevity of time before reconversion and liquidation of the subject matter. Still the definitions do not clearly indicate what Congress intended to inhibit under the term speculation. Following the familiar rule of statutory construction, to seek in the act itself the meaning of particular words by study of the context, it seems that the words immediately following 'speculation' explain and define its meaning. If that be accepted, then its meaning is that all the benefit of the title sought to be acquired is in good faith intended to be for the entryman himself, and that there is no *intent or contract* that it shall inure to any other person, analogous to the requirements in other public land legislation under settlement laws.
>
> "There is nothing in the act—other than the word speculation itself—in any way indicating that Congress intended that no one should make such entries except lumber or timber dealers, or those intending themselves to cut and market the timber. If it was intended so to limit these entries, it is obvious that more apt words might

have been chosen. If it is not to be so limited, it is an absurdity to prohibit or forfeit an entry because the entryman contemplated profiting by a sale of the land. He would not make the entry and pay money except from a motive in some way to cut and market the timber and is not by the statute required to so intend, he perforce must intend to profit in the only other way possible, namely, by a sale. [48—15] This is the construction given to the act by the Supreme Court and by the Department heretofore."

The opinion then refers to United States vs. Budd, United States vs. Bailey and Hawley vs. Diller, and continues, as follows:

"Such has been the consistent construction of the law (Instructions, 3 L. D. 84, United States vs. Bryan, 29 L. D. 149; United States vs. Searls, 19 L. D. 258, 265). It does not invalidate Lund's entry that he used the word speculation instead of the more appropriate term 'investment' to describe the motive for his entry. Nor does the fact that the others of this group admit they made their investments with view to and in hope of it proving profitable, impeach in the least their good faith. It only tends to show that they intelligently exercised a right given them by statute in a way that they hoped would prove to their financial and material advantage, as they had perfect right to do.

"The disposal of this group practically disposes of all the cases. None of them come within the rule in United States vs. Bailey, *supra*. They all but two purchased with their own money, and in a legal sense those two did so in that they borrowed and contracted a personal debt, one of whom has paid it; the entries were not planned, procured, or 'engineered' by anyone for his profit, using the entrymen as his instruments, compensated for their service in acting in his interest; no prior arrangement or contract, express or implied, is shown to have been made, by anyone of them for assignment of the interests to be obtained by the entry. Take the more suspicious on the list as an example, Annie M. Donahue, who sold to Christie on the date of her final proof. In Peasley vs. Whiting (20 L. D. 24), it was held that:

" 'Sale of a timber land claim after acceptance of final proof and prior to the issuance of final certificate does not in itself warrant an attack on the entry.'

"A special examination has failed to show any preconcerted arrangement for such a sale, or that anyone but the entrywoman herself had any interest or benefit in the entry when it was made. No other instance of immediate transfer occurs, and but one other within thirty days, Mary G. Hannah, one ninety days, Laurania M. Barnum, and one ten months, Laura M. Barnum, and one a year after the entry. These were not bought by, nor have they come

to the hands of one ownership, nor does anything tend to show any prior arrangement or that the entries were not in the exclusive interest of the entrymen.

"Under the rulings of both the Department and the Court all the entries should be approved."

In the Bailey case, the entries were cancelled as speculative, first, because the entrymen had "first satisfied themselves that these entries could be sold at a profit, and thereupon made their entries for the sole purpose of securing the profit thus in view," and secondly, otherwise stated, when the entrymen allowed themselves to be induced, persuaded and "engineered" to take up the lands for a consideration. This decision complements the Bailey decision and perhaps goes further. It decides that it is not fraudulent to make oath that the land is not [49—16] applied for "on speculation, but in good faith, to appropriate it to his own exclusive use and benefit" where it was located, not for the applicant's personal use, but to sell again at a profit, *provided,* it does not appear that the entries were planned, procured or "engineered" by anyone for his profit, using the entrymen as his instruments, or made under a prior agreement, express or implied. This statement of the case in juxtaposition with the words of the statute shows how far the Land Department's construction of the statute has gone in eliminating the *apparent* meaning of its language. In effect, since the first exception simply describes a "dummy" entry, where

a contract may be readily implied, the first provision of the act, as to speculation, is construed as equivalent to the second, that is, fraud is made to consist in a prior expressed or implied agreement only.

If the act had been construed strictly as written, it would seem that entries like these taken up for the purpose and with the defined intent of sale, though with no definite purchaser in mind, and not for the purpose of the individual's own use, would have been cancelled as speculative, even though taken up as an investment. It would not be a sufficient answer to this view to consider whether the timber lands would on this construction be made available for economical development. Such a view would not agree with the Secretary that the Act contemplates that citizens should have an opportunity to use timber lands as a subject of profit and sale either by way of speculation or by way of long time investments. To call a construction absurd, which in this view is the plain meaning of the language of the Act, is simply to impugn the wisdom of Congress, with which we have nothing to do.

It is important to note that the doctrine of the Donahue case was the rule of the Land Department at the time the entries in the cases at bar were under examination and is still its rule, so far as I am aware. [50—17]

I next consider the series of opinion in the case entitled United States vs. Detroit Timber & Lumber Company, namely, that of the Circuit Court

of Arkansas, in 1903, by Judge Rogers, 124 Fed. 393, that of the Circuit Court of Appeals of the Eighth Circuit written by Judge Sanborn in 1904, 131 Fed. 668, and that of the Supreme Court, written by Justice Brewer, in 1906, 200 U. S. 321. I take the facts from the opinion of the lower court. The bill alleged a conspiracy between the officers of the Martin Alexander Lumber Company and one Copeland, an employee and also an entryman, with the codefendants who were entrymen, to induce and procure the entrymen to make entries; it is also alleged that before the entries were made the entryman had entered into an agreement with the company that the entries should be for its use and that on the issuance of receiver's receipts they should convey to it *the timber*. Secondly, it alleged that if this agreement and conspiracy did not exist, that each of the entrymen made his entry on speculation, and not in good faith for the purpose of appropriating it to the entrymen's benefit, all of which was well known to the lumber company who aided and assisted in the accomplishment of said purpose, "to wit, the entry of said lands on speculation." [51—18]

This bill of complaint is noteworthy in that it is framed on the theory that there may be a void entry where speculation has been indulged in even though no agreement could be shown. To the second charge in the bill a demurrer was entered and overruled. All the allegations were denied in the answer. Judge Rogers said:

"Two questions arise on this record: First. Is there such a combination or conspiracy shown to have existed between the Martin Alexander Lumber Company and their codefendants (the entrymen) to obtain the lands in controversy for the use and benefit of the Martin Alexander Lumber Company as authorizes the annulment of patents issued to the defendant entrymen? Second. Did the several entrymen make their said entries on speculation, and not in good faith, and not for the purpose of appropriating the land to their own use and benefit? It will be more convenient to consider both questions together."

The proofs showed that the lumber company had a large sawmill near the lands in controversy and owned considerable timber. There was no other sawmill near enough to be practicable to cut the lands in controversy. The president of the lumber company and Copeland had a conversation as to additional needed lands and how they were to be acquired. The Homestead Act was discussed and rejected because of the time required and because the land was not fit for cultivation. Scrip was discussed and also the Timber and Stone Act. Copeland said he had discussed this act with the local Land officers and had obtained their construction of it; and *that said* he knew of a number of honest people who would like to take up land if they had the money. The president then said he would loan money to these men if they would take up land, on their notes with interest. Copeland

then hunted up various men he had talked to and others hunted him up, and he explained the law and told them they could get the money to enter the lands from a lumber company, and that the company would trust to their honesty to pay it. He showed them lands, made an estimate of the timber, and told the entrymen that the timber on the land at 50 cents a thousand feet, the market price at that time, would pay more than the land would cost, and told them [52—19] they could sell the land or the timber after the patents were issued. All of the entrymen, nearly all of whom were employees of the lumber company or had been such, entered the land under the conditions just stated. The money was furnished by the lumber company. Copeland went with the entrymen to examine the land, went with them to the Land Office, and furnished the money and expenses for the lands, all of which was paid by the lumber company and charged to the entrymen on their books. They gave notes to the lumber company and in nearly all cases they shortly afterwards sold the timber on the land to the lumber company and their notes were cancelled. By the terms of the purchase the company was to pay 50 cents a thousand stumpage and the amount which had been loaned was treated as purchase money advanced on the timber, and if the value of the timber exceeded the money advanced with interest, the seller was to get the difference. In some cases the entrymen declined outright to sell at all to the lumber company and finally sold to other parties. In such cases the

person purchasing from the entrymen was an agent for the Detroit company, and took the deeds in his own name, but gave credit to the entrymen for moneys advanced by the lumber company to the entrymen, and the lands were subsequently conveyed to the Detroit company which had succeeded to the lumber company by purchase of all its rights and interests in connection with the mill plant and land. Copeland explained the law to the entrymen before the entries. All parties denied that there was any agreement or understanding, express or implied, and there was no proof to the contrary.

Judge Rogers further said, referring to Martin's and Alexander's knowledge of the law and their reasonable expectation of getting back their money, and his language in this regard is most important to be kept in mind:

> "Nothing could have been more foolish than for them to violate the statute in order to get the land when they could get it without violating the statute, and without running any considerable risk by reason of loans. * * * The lands could be entered for $2.50 an acre by persons who could lawfully enter [53—20] them, without any agreement with the Martin-Alexander Company just as well as they could with an agreement; and, once being entered, they could be purchased by the Martin-Alexander Lumber Company as well as anyone else, and under much more favorable conditions for the reasons already stated, * * * There is no such rule of law better established than where

from a given state of facts, two opposite inferences may be drawn, that inference will be adopted which is lawful and honest and not that which is unlawful and dishonest."

The Court considered the Budd case a stronger case of fraud than that at bar because there proof was shown that Kinkaid had promised an entryman a bonus and all costs and expenses if he would enter a tract of land and convey it to him; that no such fact was developed in this case; but even in the Budd case that fact of itself was not sufficient in the face of positive testimony to the contrary. In the Budd case neither of the defendants appeared as a witness, while in the case at bar every person interested except two or three positively testified that every allegation of fraud was untrue. The Court recognized that fraud might be proven by circumstances, but they should be circumstances that are inconsistent with the integrity and legality of the patent assailed. The bill was accordingly dismissed on the ground that no agreement had been proved. The Court for some reason not apparent seems to have overlooked the second part of the bill which alleges that the entries were speculative. Unless it is to be considered that entries are only speculative when an express or implied agreement to convey is shown (and this is probably the conclusion of the Trial Court), it is difficult to see why the decree was not in favor of the Government, since the entries were plainly speculative and not for the entryman's own use. That, I think should have been the proper dis-

position of the case, since to me the reasons Judge Rogers gives against finding an express or implied agreement are unanswerable in reason. Such agreements were [54—21] not only unwise, since known to be illegal, but unnecessary to be assumed and not to be lightly assumed to exist.

The opinion in the Court of Appeals was largely taken up with the question of purchase for value without notice, which was decided against the Government. As to seventeen of the entries, however, the defense of purchase for value did not apply, and with these only are we concerned at this time. The Court said:

> "There remain 17 tracts of land the title to which still stands in the original applicants and patentees. The Detroit Lumber Company owns the timber on these lands, and had the right to remove it according to the terms of the timber contracts. The land without the timber is of little, perhaps of no value. The evidence in this record has convinced, *not that these applicants made any agreements* by which the title they might acquire should inure to the benefit of any person except themselves, but that each one of them applied to enter the lands he or she obtained on speculation for the use and benefit of the Martin-Alexander Company, and not in good faith to appropriate it to his or her own exclusive benefit."

The decision is plainly right and puts the case on the proper ground of reasoning.

The decision of the Supreme Court was written

by Justice Brewer, who wrote the opinion in the Budd case. A great part of the opinion is taken up with a discussion of the question of purchase for value without notice. As to the seventeen entries, however, the Supreme Court in its statement of facts said:

> "The Court of Appeals, reviewing the testimony, held that there were contracts between the parties making the entries and the Martin-Alexander Company, prior to the entries, and that therefore those entries were in fraud of the act, but it also found that the purchase by the Detroit company was in good faith, and that therefore that company was entitled to protection in its purchase."

This is an obvious error, as will be apparent from the quotation from the Court of Appeals opinion just above set forth. In the beginning of the opinion the error is continued, where Justice Brewer states that there are two questions of fact: First, whether the parties making the entries had made prior agreements with the lumber company for a conveyance, "or were seeking to acquire title solely for their own benefit," and second, whether the Detroit company was a purchaser in good faith. Justice Brewer said that the Circuit Court was of [55—22] the opinion that there were no agreements between the parties and that the Court of Appeals was of a different opinion and held that the entries were made in pursuance of such agreements; that since the two courts below had disagreed on the facts, the Supreme Court would re-

examine the facts, and having done so, agreed with the Court of Appeals. Justice Brewer said:

> "The entire management of these entries was in the hands of an agent of the Martin-Alexander Company. It furnished the moneys, both for the purchase price and all expenses; and it is not easy to believe that it did all this on a mere expectation that, after the entries had been made, it could purchase the timber. It is a much more reasonable conclusion that it had an understanding with the parties making the entries respecting purchases and prices. It is quite likely that the entrymen were not conscious of wronging the Government, and thought that if it received the full price demanded, that was enough. * * * So, without casting an imputation of intentional perjury on those parties, we agree with the Court of Appeals that the testimony points strongly to the fact that the entries were in pursuance of an understanding or agreement with the Martin-Alexander Company that, as it was advancing all the money, the entrymen should convey to it the standing timber at a fixed price."

With deference it must be said that the opinion of the learned Justice is disappointing. The decision is plainly right, but it is right for the reason stated by the Court of Appeals and not for the reasons stated by the Supreme Court. Every case, even though it be a decision of the Supreme Court, is authority so far as it applies the law to the facts.

Courts, however, are not necessarily bound by the reasoning upon which the result is predicated. This is especially so where different opinions conflict. The theory of this case agrees with the dictum in the Budd case, but it does not agree with the reasoning of the Secretary of the Interior, which was approved in Diller v. Hawley. To me, the reasoning of the *nisi prius* judge which appears to have convinced the Court of Appeals that there was no agreement is more conclusive than that of Justice Brewer that there was such an agreement. Had the Supreme Court borne clearly in mind, as it did, not what was the decision of the Circuit Court of Appeals, the error in the Budd case would have been corrected and an opportunity could have been properly and [56—23] profitably seized to have declared upon pleadings appropriate for the purpose that entries were invalid when speculative equally with entries where an agreement had been entered into. Under the circumstances, however, it must be admitted that the language of the opinion of the Supreme Court is authority for the contention that an entry can be considered as speculative only when an agreement has been proven; or, in other words, that the first part of the statute under consideration might as well have been omitted by Congress.

The next series of cases to be noted are those of United States v. W. A. Clark, decided, first, in the Circuit Court of Montana by Judge Knowles in 1903, 125 Fed. 774, by the Circuit Court of Appeals for this circuit in 1905, Judge Ross delivering the

opinion of the Court, Judge Morrow concurring and Judge Gilbert dissenting, 138 Fed. 294, and by the Supreme Court in 1906, Justice Holmes writing the opinion, 200 U. S. 601. I take the statement of facts from the quoted statement in Judge Ross's opinion. Only the decision in the lower court will be here referred to, since both the Court of Appeals and the Supreme Court assume, because of the pendency of criminal proceedings on the same facts, that the entries were fraudulent and thereupon decided the defense of purchase for value adversely to the Government.

The bill was against W. A. Clark to cancel eighty-two patents on account of fraud by the patentees. After certificate issued the entrymen conveyed to one Cobban, and Cobban conveyed to Clark before patent. The bill alleged that Cobban, claiming to act for the use and benefit of Clark set about the business of procuring the title to the land described, and in pursuance thereof entered into a contract in writing with one Griswold to obtain lands under the Timber and Stone Act; that Cobban associated with himself one Catlin, and that Cobban, Griswold and Catlin by and through themselves and others examined [57—24] lands and procured various persons for hire to enter the land under said act, paying their expenses and those of their witnesses, and paying the price required by the United States; that after such sworn statements were made and the final proofs made, and the money paid for witnesses' expenses, entrymen's expenses, land office fees, and the price, the several

entrymen were paid compensation by Cobban, who then took deeds to himself and thereafter conveyed the same to Clark; that the applications and proofs were false, and that each of the applicants applied to purchase on speculation and did not in good faith purchase the same for their own exclusive use and benefit, and that each of them had made an agreement with another person by which the title acquired from the Government should inure wholly to the benefit of another; that Clark well knew in a general way, if not in detail, the facts underlying the entries. The bill, while framed to follow the words of the Timber and Stone Act and including thus a reference to purchase on speculation, must be considered as based upon the theory of prior agreements.

Judge Knowles quoted from the Maxwell Land Grant case and referred to the fact that the entrymen who were examined denied on the stand that they had made any contracts to convey the land to Cobban before final proof and purchase, and said:

> "While there may be suspicion that this evidence was not correct, and a supposition that there must have been made some contracts between Cobban and themselves in regard to this matter, it must be borne in mind that these witnesses were witnesses produced by complainant, and, except when the witness Griswold testified otherwise, no evidence was introduced to contradict this, and the Court is called upon by the complainant to find from its suspicion or supposition that there was such

a contract. Cobban himself testified that he knew the law, and knew that such a contract was in violation thereof, and that he was careful to make no such contract whatever; and, again, Cobban was a witness for the complainant."

The Court then referred to the Colorado Coal & Iron Company case, the Budd case and the Detroit case in the lower court as furnishing stronger cases for the setting aside of a patent for fraud, and said: [58—25]

"Considering the rule as to evidence necessary to establish fraud in such cases as this and the rulings of the courts in above cases, I am constrained to the view that it is not established that the entrymen and entrywomen and Cobban committed the frauds charged in the bill."

That is to say, Judge Knowles held that in view of the strict requirements of proof for the setting aside of patents, he could suspect but could not find that agreements to convey existed; and he points out the significant fact that Cobban knew very well that he must avoid the making of agreements. It seems to me very likely that the decision was correct under the pleadings as framed, namely, on the existence of a prior agreement. It also seems possible that, had the pleadings, as in the Detroit case, contained an allegation that the lands were being taken up on speculation, and not for the use of the entrymen, the Government might have succeeded. Certainly this would have been so on a strict con-

struction of the act such as I have several times set forth, though whether it would have been so under the more limited construction of speculative entries adopted by the Department of the Interior in the Bailey case, and especially in the Donahue case, one cannot say with confidence in the absence of knowledge of the testimony. It is, however, apparent that here to my mind is an instance of the evil of engrossing of public lands, which under the terms of the Timber and Stone Act it is sought to avoid. The Government's contention here than an agreement must be so implied, imposed as it often does, too great a strain on the conscience of the chancellor, a strain to which in this case Judge Knowles did not feel that he should yield, though obviously suspicious of the entries.

The next case in chronological order to be noted is the decision of the Circuit Court of Appeals of the Eighth Circuit in United States vs. Olsen, decided in 1904, in an opinion written by Judge Munger of Nebraska, 133 Fed. 852. This was a criminal case in which the charge of the Court to the jury was under review. The indictment charged Olsen and others with the crime of conspiracy to defraud the United States of the [59—26] title to large tracts of land, and that in pursuance of the conspiracy they caused entrymen to enter land under the Timber and Stone Act not for their own use but for the use and benefit of the defendants. The testimony showed that Olsen, a timbercruiser, asked several parties if they wished to make fifty dollars; being inquired of as to how

it could be done, he told them by taking up a claim under the Timber and Stone Act, explaining somewhat to the parties the provisions of the act. On being informed that the parties had no money for expenses, he said that would be arranged for. At his suggestion these parties informed others, who called upon Olsen. This resulted in Olson taking about twenty-five persons to a point near the land in question, where they went a few hundred feet back into the timber, remained a few hours, and returned; none of the entrymen paid any of the expenses of the trip, and the testimony did not show who paid them, but the fair inference was that they were paid by Olson. They were all informed by him that they could make fifty dollars by taking a piece of land under the Timber and Stone Act, but were also informed by him that under the law they could not offer to sell it until they had made final proof; upon their return he notified them to go to the office of another defendant to arrange for filing, which was done, and the filings made on descriptions furnished by Olson. The publication notices were prepared by one of the defendants without any suggestion from the entrymen, who had no knowledge that any such publications were made until the time of making their final proofs. Final proofs were made after the entrymen had been coached as to the questions to be asked and the answers to be given. Each one thereupon gave a mortgage to cover the amount required to be paid by the Government and the expenses already incurred, these mortgages being made to another co-

defendant. A few days after final proof each of the entrymen at Olson's instance executed a deed to another codefendant for all the timber upon their land, the consideration in each deed being stated as the sum of five hundred dollars, which was fifty dollars more than [60—27] the amount of their mortgages. The Court reviewed the decision in United States vs. Budd, and the decision of the Circuit Court of Appeals in the Detroit Timber and Lumber Company case, and said:

> "In the light of these decisions, as well as a sensible construction of the statute, we have no hesitancy in holding its true meaning to be that any citizen of the United States may purchase lands as therein provided, where such purchase is for his own exclusive use and benefit, notwithstanding at the time of such purchase he may have in contemplation a future sale for a profit; that what the statute denounces is that a party shall not, at the time of the purchase, have directly or indirectly made any agreement or contract in any way or manner, with any person or persons, by which the title which he may acquire shall inure, in whole or in part, to the benefit of any person except himself; that the application for the land must be made in good faith for his own exclusive use and benefit, and not as the agent or hireling of another to obtain the land for someone besides himself. This view of the meaning of the statute forbids sustaining the contention of counsel for plaintiff in error that

there can be no violation of the act unless an enforceable agreement was made by the applicant before his application to enter the land whereby the title should inure to the benefit of another. To hold that the provisions of the statute that the applicant shall not have in any way or manner, directly or indirectly, made any agreement or contract, whereby the title which he may acquire shall inure to the benefit of anyone except himself, contemplates an agreement or contract in writing good under the statute of frauds, would be to destroy the prohibitive conditions mentioned, and render ineffectual the object and purpose of the statute."

The Court also stated at page 856:

"The indictment was based and the trial had upon the theory that these entries were not made in good faith by the several entrymen for their own use, but were made for the use and benefit of one or all of the defendants. A large amount of testimony was introduced for that purpose; in other words, it was sought to establish that the various entrymen, at the time they made their entries at the land office, did not intend the purchase to be for their own use and benefit, but as the agent or hireling of the defendants, for the use and benefit of the defendants, or some of them. We have before said that it was not necessary for the Government to establish any express agreement that the entry was made for someone other than

the entryman, but that it was competent to show that the motive and intent of the party making the entry was that it was for the use and benefit of another; that the question for the jury to determine was, what was the purpose, intent, and motive of the parties when they made the entry? That being so, it follows that the intent and motive of the party was the subject of inquiry; and the law we think to be that, whenever the motive, belief, or intention of the person is a material fact to be proved under the issue, it is competent to prove what such motive, belief, or intention was by the direct testimony of such person, whether he happens to be a party to the action or not. * * * The testimony of such party as to his intent and motive is not conclusive, but is competent. We do not wish to be understood as saying that, had the Government shown a specific, express agreement between the entrymen and the defendants that in consideration of a given sum they would enter the land and then convey to the defendants, such testimony would be admissible. It [61—28] is unnecessary to now pass upon such a case. What we do decide is that, where it is sought to show by a chain of circumstances that a party in doing an act was actuated by an illegal purpose and motive, it is competent for the party to testify directly that he had no such purpose or motive; and also, where it is sought to show by a chain of connected acts and circumstances that an agree-

ment existed, an agreement requiring the concurrence of minds, that it is competent for a party to such alleged agreement to testify directly that no such agreement existed."

This opinion briefly is to the effect that it is not necessary to prove an express agreement to convey, but that the entry would be fraudulent where the entryman was shown to be "the agent or hireling of another to obtain land for someone besides himself"; in other words, a mere dummy.

The facts of the case show that the entrymen acted at no time of their own volition. They were not unconscious instruments in the perpetration of a fraud, but were consciously dummies in the transaction. The case thus stands for the proposition that no agreement is necessary, but that the entry will be fraudulent also when the entrymen know that they are mere instruments or dummies. The case does not help us particularly, however, to define the meaning of a speculative entry, since one who takes up land under these circumstances with a distinct purchaser in view, can be said to be speculating in fraud of the act under the doctrine of the Bailey case, approved in Hawley vs. Diller, or can be said to be operating under an agreement readily to be implied. We may question, however, whether if the dictum of the Budd case, previously referred to, is law, such entries could be considered either speculative or as made under an implied agreement.

The next case to be noticed in the chronological history is United States vs. Richards, 149 Fed. 443,

a decision rendered in 1906 in the District Court of Nebraska by Judge Munger, who wrote the opinion in the Olson case. This was a charge to the jury in a criminal case construing the Homestead Act, which contains similar prohibitions against an agreement to sell as are contained in the Timber and Stone Act, and is pressed upon our attention by defendants' counsel with a view to consideration along with the same judge's remarks in the Olson [62—29] case. The Homestead Act requires an oath of the entryman, among other things, as follows: That such application is honestly and in good faith made for the purpose of actual settlement and cultivation and not for the benefit of another person, persons or corporation, and that he or she shall faithfully and honestly endeavor to comply with all of the requirements of law with reference to settlement, residence and cultivation necessary to acquire title to the land applied for; that he or she is not acting as agent of any person, persons, corporation or syndicate in making such entry, nor in collusion with any person, persons, corporation or syndicate to give them the benefit of the land entered or any part thereof, or the timber thereon; that he or she does not apply to enter the same for the purpose of speculation but in good faith to obtain a home for himself or herself; and that he or she has not directly or indirectly made and will not make any agreement or contract in any way or manner with any person, persons, corporation or syndicate whatsoever by which the title he or she might acquire from the Government of the United

States should inure in whole or in part to the benefit of any person except himself or herself. Judge Munger said:

"The statute * * * means by the word 'agreement' that there must be a meeting of minds expressed in some tangible way, and must be an intent in some way to be binding upon the parties. One party may have intended to sell, the other party may have intended to buy, yet this would not be sufficient, unless the intention of each was in some way communicated from one to the other, and was understood and agreed to by both.

"An agreement, as the word 'agreement' is used, need not be in writing. It need not be of sufficient form or of the nature to be enforced in court. It is enough if it is proven beyond a reasonable doubt that in some way the minds of the applicant and some other person have met definitely and understandingly—that there is a mutual consent—that, when the applicant may acquire title to the land from the United States; it shall inure to the benefit of such other person for a consideration; that is, that in truth and in fact the applicant is ready to acquire the land for the use and benefit of another. And any words and acts manifesting this mutual consent of the minds of the parties are sufficient to constitute a contract or agreement.

"The applicant, under the statute, is also required in his affidavit to state that he does not

apply to enter the land for the purpose of speculation, but as a home for himself. This provision, that he does not seek to acquire it for speculation, was not intended to limit the homesteader's dominion over the land after he has complied with the provisions of the homestead law, made his final proof, and acquired title. *It is only intended to prohibit his entering the land under an agreement whereby he is acting for* [63—30] *another.* He may acquire valid title under the homestead law with a view of disposing of the same after he has completed the purchase, provided that at and before the time of completing such purchase under the homestead law he has not entered into an agreement with another whereby such other should receive any of the benefit of such purchase. * * *

"You are further instructed that the mere advancing of money to a party to enable him to enter his homestead, or advancing money to make improvements thereon, are not of themselves unlawful acts, but are simply acts and circumstances which may be considered in determining whether or not there was a conspiracy as alleged, or unlawful agreement by which the entryman was to make the entry, not for his own use and benefit, but for the use and benefit of another. * * *

"The jury is instructed that they are not entitled to infer fraud from the mere fact that a large number of entries may have been solicited

and located by any of the defendants; If the entries themselves are legal. The great number of them would not make them illegal. * * *

"To say to an entryman upon Government land under the Homestead law that if, after he has made final proof and obtained title to the land, he desires to sell it, you will give him a definite sum of money therefor, is not a crime, and does not constitute an unlawful agreement respecting the title to public lands.

"The jury is instructed that there is no law of the United States preventing an entryman from agreeing with any person at any time that, when he has proved up on his land, if he desires to sell, he will give that person the first chance to buy it, and that such an understanding of itself is not in violation of law. The mere fact that the homesteader may have said that, after he should prove up, he would sell if he could obtain a satisfactory price, or that he would give another the first chance to purchase, should he conclude to sell, or the mere fact that a party may have said to the homesteader, when he proved up, he would give him a stated sum, such statements alone would not constitute an agreement. * * *

"The jury is instructed that the defendants, or any of them, had a perfect right to advance money to entrymen to pay filing fees, and to agree that, in the event the entryman desired to sell after he had proved up and the defendant then desired to buy, such advances should be

credited on the sale, or if no such arrangement was thereafter made the money would be refunded, and that such an agreement would not, in and by itself, be a violation of any law of the United States. But such fact may be considered in connection with the other evidence in determining the existence of the alleged conspiracy or corrupt agreement."

This case was affirmed by the Circuit Court of Appeals of the Eighth Circuit in the 175 Fed. 911, without, however, any comment on the quoted portions of the charge. Certiorari was denied by the Supreme Court on October 17, 1910. The fact of affirmance, however, can be given no particular weight, since the charge as quoted was favorable to the defendants. Taking the Olson decision and the Richards' decision together, it [64—31] would appear that Judge Munger gives no effect to that portion of the statute regarding speculation, since he denounces an entry as speculative only when an agreement has been made for a conveyance. He believes that agreements should be proved with the same distinctness as any contract and apparently is only ready to imply an agreement where, as in the Olson case, the facts show the consciously dummy character of the entrymen. My comment on these decisions is that it illustrates the difficulty of logically defeating fraudulent engrossment of the public lands by finding an agreement. It seems to me that Judge Munger is right in insisting upon the same clearness in the proof of the details of the agreement, express or implied, as would be required in the proof of any other contract. Such

agreements are naturally avoided by those advised of their illegality. The most ready remedy, as I have said, would have been by a strict interpretation of the law against speculation, and in construing the meaning of that word I would not agree with Judge Munger if the question was an open one.

In 1908 the Supreme Court, speaking by Mr. Justice White, in United States vs. Williamson, 207 U. S. 425, decided that the act did not prohibit either a sale or an agreement to sell the lands entered into before final proof but after entry. The indictment charged perjury in making answer to a question on final proof as to whether the entrymen had sold or agreed to sell the lands entered, such question and proof being required by the regulations of the Secretary of the Interior. The court held that a careful examination of the statutes showed that Congress had advisedly in Section 3 omitted this oath required of the entrymen by Section 2 in his initial sworn statement, and that therefore the act did not prohibit such a sale or agreement made after entry, and that the regulations of the Department of the Interior in that regard were void. This decision put a different interpretation on the act from [65—32] that previously held by the courts and by the public generally, and is undoubtedly correct. It may be said, however, as was said by the Secretary of the Interior in the Bailey case regarding conveyances shortly after final proof, that conveyances or agreements to convey made shortly after entry, or other facts as to the dealings of the parties after entry, have a significance in so far as they may tend to show an agree-

ment prior to entry. This at any rate was the Master's view at the trial under which evidence of transactions occurring after entry, including final proof papers, were all admitted as circumstances upon which the question of fraud could be determined. In view of certain statements of Justice White in United States vs. Biggs, however, I have some doubt as to the propriety of this ruling.

The case of United States vs. Biggs, 211 U. S., 507, decided in 1909, an opinion by Mr. Justice White, is to the same effect as United States vs. Williamson. The construction of the Williamson case which I have referred to in the last paragraph occurs at page 520 of the report. The question was as to the admissibility of the final proof papers. Justice White said:

> "The Government insisted that the papers were admissible because the indictment charged a conspiracy to suborn perjury not only at the time of the application to purchase, but also in the subsequent stage of making the final entry; and that, even if this were not the case, the affidavits made after application were admissible for the purpose of showing the motive which existed at the time the application was made. It was decided that the indictment only charged subornation of perjury at the time of the application. Passing on the alleged contention as to motive, it was held that, in view of the requirements as to an affidavit exacted by the statute to be made at the time of the application, as to the *bona fides* of the applicant and his in-

tention to buy for himself alone, and the absence of any such requirement in the statute as to the final entry, that the prohibition of the statute applied only to the condition of things existing at the time of the application to purchase, and did not restrict an entryman, after said application was made, from agreeing to convey to another and perfecting his entry for the purpose, after patent, of transferring the land in order to perform his contract. *It was, therefore, held, that the affidavits made at the final stage of the transaction were not admissible to show* [66—33] *motive at the time of the applications to purchase* (Italics mine), and that any requirements contained in the rules and regulations of the Land Department making an affidavit essential to show *bona fides,* etc., at the final stage, were *ultra vires* and void."

What effect this decision, especially the italicised portion, may have on the facts of this case will be hereafter discussed. I merely make the remark at this time that it seems to throw one of many obstacles to the implication of an agreement from subsequent events, such as the Courts have been very ready to make and naturally so where a suspicion of fraud was so strongly present.

The next case in order is the decision of the trial court in United States vs. Barber Lumber Company, a decision of the Circuit Court of Idaho by Judge Bean in 1909, reported in 172 Fed. 948. This was a bill to set aside 210 patents for lands obtained under the Timber and Stone Act. Barber and Moon

were eastern lumber men who later formed the Barber Lumber Company. The bill alleged that Barber, Moon, and the lumber company, conspired with ex-Governor Steunenberg of Idaho and one Wells and Downs and other parties to fraudulently procure for them public lands by procuring certain named persons to avail themselves of the Timber and Stone Act under an agreement, whereby the said company and its codefendants agreed to purchase the lands as soon as patents should be secured, they agreeing to furnish or procure to be furnished and supplied money to pay all expenses in making the filing and procuring title. Judge Bean recited the allegations of the bill referring, as has been seen, to prior agreements and said:

> "In a suit of this character the bill must show specifically and in detail in what the fraud consists and how it was effected, and, although the complainant may make out a case which, under other circumstances would entitle it to the aid of the Court, yet if it is not the case made by the bill, it cannot recover. Southall vs. Farrish, 85 Va. 404, 7 S. E. 534, 1 L. R. A. 641; Kent's Admr. vs. Kent's Admr. 82 Va. 205; Lewis Publishing Co. vs. Wyman, 168 Fed. 756."

This statement must be constantly borne in mind in considering [67—34] the opinion.

There were three classes of timber and stone entries concerned in this case, those known as the Basin Lands, those known as the Crooked River Lands, and those known as the 6–4 Lands. Downs and Wells had become familiar with the lands in the Basin at a

prior period, and had established themselves in business as locators of entrymen; they had thus located about seventy-five applicants up to January 1, 1902. As part of their plan they had furnished money to some of these applicants. In February, 1902, Steunenberg became interested and with one Sweet began purchasing these lands. Early in March, 1902, Steunenberg had an interview with Barber, an eastern lumberman, and stated that he had 6,400 acres under final receipt, that there were about 5,000 acres more for which application had been made and which could be purchased after final proof at not to exceed five dollars an acre, and that enough more could be secured in the same vicinity by the use of lieu scrip to make a total of 25,000 acres. Accordingly a contract was made between Barber and Steunnenberg on the 10th of April, 1902, whereby Barber bought out Sweet, Steunenberg agreeing to procure by good title within six months 25,000 acres of land at a stipulated cost, Barber agreeing to advance funds to purchase scrip and also to acquire title from persons other than the United States. At that time all of the entries had been made except about eighteen, but no final certificates had been issued because of executive order, though that fact was not known by nor communicated to Barber and his associate Moon. Judge Bean said as to these lands, that there was no evidence that any of the entries were made at the instigation of or in the interest of Barber and Moon or the Barber Lumber Company, which was organized on the 20th of the following July. They did not know anything of the entrymen, nor were they their

agents or employees, nor had they heard of the [68—35] Basin Lands prior to February, 1902. Forty-nine of the 92 entrymen of these lands were witnesses and denied any contract with Barber or Moon or the company or anyone else; and testified that the entries were made for their own use and benefit. The Court stated that the averment of the bill, that the entries were made ostensibly in the name of the applicants but in reality for the Barber Lumber Company, was wholly unsupported by the testimony. In response to the argument of the Government that there must be some powerful financial interest back of the movement, since the entrymen were poor, and Downs and Wells likewise poor, and that it must be assumed that they were the promoters of the movement, the Court said:

> "But a patent of the United States for land, regularly issued, and signed by the proper officers of the government, cannot be avoided or set aside on mere conjecture or suspicion. The fraud charged in the bill in a suit for that purpose must be established by clear and convincing proof. * * * It is just as reasonable and certainly more just to suppose that the entrymen and entrywomen in making the applications to purchase acted, as they each testified, honestly and in good faith, than it is to conjure up some contrary theory, which necessarily assumes that all of the witnesses in this case upon that question perjured themselves upon the trial. * * * The burden of proof is upon the Government to show that the patents which it had

issued were procured by fraud before said patents can be avoided. Mere inference, conjecture, or suspicion is not enough."

The Court then considered the Crooked River Lands. The facts show that the acquisition of lands in this section was not contemplated when the contract between Barber, Moon and Steunenberg was entered into in March, 1902. The locators Downs and Wells had learned of this land in the fall and winter of 1901 and investigated it in the spring of 1902. No applications under the timber and stone act were made until the last of August, 1902. About that time Steunenberg advised Barber that there was a large body of land in the Crooked River country which could be secured by the use of lieu scrip. Barber instructed Steunenberg to have the land cruised. About this time the locators Downs and Wells, no doubt with knowledge of the instructions to Steunenberg, began actively locating persons under the Timber and Stone Act, collecting a fee of $25, and from the 25th of August to the 18th of October, 1902, [69—36] 79 claims were so located. In December Steunenberg informed Barber of the locations and that they were an obstacle to the acquirement of the lands by the use of scrip, and were thereupon instructed to have the lands examined and to purchase them, if satisfactory, at a price not to exceed $1,000 a claim after final proofs were made and they were on the market. This was accomplished in February, 1903. The Court said:

"It is charged in the bill and argued on behalf of the Government that all of the entries

were made by the entrymen ostensibly in the names of the entrymen but in reality for the use and benefit of the Barber Lumber Company, and with the intention on its part to evade the provisions of the Timber and Stone Act. Except the mere inferences to be drawn from the fact that the company was willing and perhaps anxious to obtain lands in that district, and that it did subsequently acquire title to all these lands, there is no evidence to support the averments of the bill. On the contrary, all the testimony negatives any such conclusion. Many of the entrymen and entrywomen were called as witnesses in this case. Each and every one of them testified unequivocally and directly that the averments of the bill, so far as he or she was concerned, were false, and that there was no understanding or agreement by which the title to the land should inure to the benefit of any person other than the applicant, and that he or she had made no agreement, directly or indirectly, with any person to that effect. Thirty-four of them testified that they did not know at the time of their filing of any market for the land. Some of the others said that they had been told that the lands could be sold, but that they did not know who the purchaser was to be. Now, in the face of this testimony, which stands here on the record uncontradicted, the Court would not be justified in finding the allegations of the bill to be true. It is to my mind more reasonable to suppose that Downs and Wells, and perhaps Kin-

kaid, having learned or suspected that the Barber Lumber Company were contemplating acquiring title to the lands by the use of scrip, conceived the idea of frustrating this plan, and earning some money for themselves, from persons desiring to purchase land under the Timber and Stone Act than to suppose the applications were made in pursuance of an unlawful and corrupt agreement between the applicants and the defendants."

The Court next considered the 6–4 lands. The plat of the 6–4 lands was not filed in the local land office until July 15, 1903, so that until that date the land was not open to entry. Barber had telegraphed Steunenberg prior to this not to neglect these lands and Steunenberg was making preparations to file lieu land scrip then owned by the company on the land within this township. Some delay took place and in the meantime Downs took a large number of persons who applied to him for timber and stone [70—37] locations into the township and selected all of the available lands therein, each entryman paying Downs $25 for his service and information. Some of these entrymen were advised to enter the land by Downs, some by his associate Kinkaid, but many acted on their own initiative. Twenty out of 30 applicants as witnesses each swore that the entry was for his own use and benefit and that he paid a location fee of $25 and all expenses incidental to visiting the lands and entering them in the land office, and that all but two or three paid for the land

from their own funds, these borrowing the money from Mr. Kinkaid. The Court said:

> "There is no evidence that this money was furnished by or was the property of the Barber Lumber Company, but if it had been it would not have invalidated the entries unless they were made originally for the Barber Lumber Company or under a contract or agreement, express or implied, between it and the entrymen or entrywomen, that the title acquired should inure to the benefit of the company. There would have been no illegality nor fraud in the entrymen or entrywomen subsequently contracting to sell the land to the company prior to the issuance of the patents, and the company advancing the necessary money with which to make final proof to enable the entrymen and entrywomen to comply with such contract. It is probably true that some of the applicants for these 6–4 lands knew that the Barber Lumber Company was or had been buying lands in that vicinity, and it may be that they expected that they would be able to sell their lands subsequently in case they should later conclude to dispose of it; but there is no testimony showing that there was any such agreement or arrangement prior to the time the applications were made."

The Court referred to the fact that the company then owned at least 6,000 acres of lieu scrip costing $5.35 an acre which could have been used legally, and made this comment:

"It is incredible, therefore, to believe that it would resort to a fraudulent or unlawful scheme of acquiring title, through dummy applications at a cost to itself greater than it would have cost to have acquired the lands by the use of scrip in a legal and lawful manner."

The Court then made this summary of the law:

"It therefore seems lawful under the Timber and Stone Act: (1) One desiring to acquire title to timber land may make known his willingness to buy the same at an advance over the Government price; (2) Another person knowing of that fact may make entry with the expectation of selling to such intending purchaser; (3) The entryman may, at any time after his application, sell or contract to sell to the other; (4) The transaction is not denounced by the statute to be illegal or unlawful if there has been nothing further [71—38] in the way of communication or contract or agreement between the parties than is here stated.

"Now, the evidence in this case does not show as intimate connection between the entrymen and the defendant company as the courts have thus approved. There is no evidence that the Barber Company or anyone representing or acting for it ever at any time signified a willingness or desire to purchase lands in either the Crooked River or 6–4 District at an advance over the Government price, or at all, except by the use of lieu land scrip. Nor is there any testimony that any of the applicants

intended or expected at the time their initial applications were filed to sell or dispose of their lands to the Barber Lumber Company. It is, I think, probable that there was a general understanding among the entrymen and entrywomen, not put into words perhaps, but nevertheless existing, that they would take the lands, and that it would subsequently be assembled into one large body and sold at a uniform price to some subsequent purchaser, but there is no evidence that they had any particular purchaser in view, or that the Barber Lumber Company were regarded as the probable purchaser nor that it had any intention of acquiring title to the lands by means of applications under the Timber and Stone Act, nor that any of these entries were made by procurement or solicitation nor under any contract or agreement with it, express or implied.

"In this case the Government grounds its right to recover upon the averment that the entrymen and entrywomen did not make application for the land in good faith for their own use and benefit, but, on the contrary, entered such lands for the benefit and under an agreement with the answering defendant."

The Court then referred to the fact that 130 entrymen, Barber, Moon, Wells and Downs all testified that there was no agreement with the applicants as to what should be done with the land. Wells and Downs had no interest in the matter except their location fees, and by the evidence were

acting for themselves alone. The Court said that the Government cannot insist that the testimony of the entrymen was unworthy of belief because it did not support the averments of the bill.

> "The testimony was competent, and unless self-contradictory or inherently improbable, it must necessarily prevail in the absence of contravailing evidence. * * * There are some matters connected with the acquisition of title to the lands and the payment therefor which are calculated to arouse suspicion as to the good faith of the transaction, but they are not sufficient to overcome the positive testimony in the case, and could probably have been explained but for the untimely assassination of ex-Governor Steunenberg."

The bill was accordingly dismissed. [72—39]

Upon this case I make the following comment: It will be observed that the decision is not based upon the ground that Barber or the company were purchasers for value without notice. The Court several times made mention of the fact that the issue for its decision was whether the entrymen had made a contract, express or implied, prior to their entries with the Barber Lumber Company or those acting in its behalf. The Court decided that no evidence of such agreement could be found. The testimony was to the contrary and to the effect that the entrymen had been located by independent locators operating in their own interest for the sake of the fees they might acquire. The Court, however, is unwilling in this case to imply an agree-

ment as to any entry where it appeared that the entry was made in expectation of sale or even in expectation of sale to the Barber Lumber Company then operating in the vicinity. The Court is also unwilling to imply an agreement from the fact that the entries were, many of them, induced or procured by the locators even where it appeared, as in some cases, that the purchase money was loaned. Since the pleading made it possible for the Court to find that the agreement was to be implied, the decision was directly upon an issue. The opinion does not consider the question of speculation and therefore is not an authority on that point. It would seem, however, that the Court would not consider it a speculative entry if it were taken up with the expectation of sale immediately after final proof or even promptly after entry, nor would the Court consider it a speculative entry if the expected purchaser were defined in the mind of the entryman as the Barber Lumber Company, provided apparently, in all cases that the Barber Lumber Company or other intended purchaser had not procured or solicited the entry or had anything to do with it other than making known its willingness generally to buy at an advance over the Government price. [73—40]

Under the doctrine of this opinion, strictly applied, as stated, it would seem difficult in many cases to find either an express or implied agreement upon any proof likely to be at hand. However, under the rules laid down by the Supreme Court as to the character of proof required to can-

cel patents, and under the ordinary law of contracts, the case seems well reasoned and entirely right. It is another illustration of what I consider sufficiently established, namely, that the true remedy for most of these fraudulent entries, if they are such, would probably be found in an application of the law of the portion of the statute relating to speculation, if that remedy is now open, and not to that portion relating to agreements.

This case was decided on appeal in February, 1912, United States vs. Barber Lumber Company, 194 Fed. 24. Judge Gilbert writing the opinion of the court, stated the facts substantially as above with the additional mention of the fact that in the contract between Barber and Moon and Steunenberg it was provided that when the corporation to be formed should be organized, a quarter of the stock was to be issued for the benefit of Steunenberg, but held as collateral security by Barber and Moon for money advanced under the agreement. The opinion first reviews the law as shown in the various decisions of the Supreme Court. The well-known passage from the Budd case, which I have criticised as unnecessary to that decision, was [74—41] quoted without comment. The facts of the Detroit Lumber Company case were stated, and a portion of the opinion of the Circuit Court of Appeals finding that there was no agreement, but that the lands had been obtained on speculation was quoted, as was also that portion of the Supreme Court's opinion as regards the 17 entries found to be fraudulent. The Clark case was referred to as

a case where it appeared that Cobban before taking steps to acquire lands had negotiations with Clark and thereafter induced entrymen to take up claims that they might sell to him and receive $100 each for so doing; where it appeared also that Clark at the time entries were made sent cruisers on the land and loaned money to Cobban with which to make payments at the land office by the entrymen. Of this case Judge Gilbert said:

> "The Supreme Court affirmed the judgment of this court that upon the evidence there was no ground to charge Clark with participation in Cobban's fraud upon the land laws, and that Clark's knowledge of the fact that Cobban was carrying out a large and comprehensive scheme to obtain the land, of the fact that 17 of the deeds were made on one day, 29 on another, and 22 on another and that all were executed before patents were issued, and many within two days after the execution of Receiver's final receipts, was not sufficient to put Clark upon inquiry as to the method by which Cobban's titles had been acquired."

The Court then stated the Williamson case and the Biggs case, and after this review of the decision Judge Gilbert said:

> "The decision of the present case is ruled by the legal principles announced in the Budd case and in the Clark case. These decisions are authority for the proposition that a person or corporation desiring to acquire title to a large body of timber lands of the United States

under the timber and stone act may express that desire to another, and may enter into an agreement with him to buy the lands upon his obtaining title thereto, may loan him the money with which to acquire title, and may inspect and select the lands, and that such person or corporation is not bound to inquire into the method by which the other party to the contract acquires title, and is not chargeable with knowledge of any fraud upon the land laws that he may resort to, and that in taking titles based upon the issuance of final receiver's receipts to the entrymen without actual knowledge of such fraud or of facts sufficient to put one upon inquiry, such person or corporation is an innocent purchaser of the lands. The contract which was made between Steunenberg and Barber and Moon was similar to that which Clark had with Cobban in United States vs. Clark, and under the authority of that decision, we hold [75—42] that it was not a conspiracy to accomplish by concerted action an unlawful purpose as urged by the appellant herein, and that it was justifiable. That contract contemplated the acquisition by Barber and Moon of the 6,400 acres which Steunenberg represented that he had already purchased, and 5,000 acres in addition which had then been filed upon, and which he contemplated purchasing after final proofs. The contract called for 13,600 acres more, and the court below found from the evidence that that was to be

obtained by the use of scrip. But assuming that it was to be obtained by entries under the timber and stone act, and that it was so obtained, there is no substantial proof that Steunenberg resorted to means not warranted by the decision of the Supreme Court above cited. He could rightfully go into the Idaho timber country and make known generally his willingness to buy timber lands at a price in excess of that which it would cost to obtain it from the Government, and persons knowing of that offer might rightfully go to the land office and make application, and purchase a timber tract for the purpose of selling it to him."

For convenience I interrupt my statement of the decision to comment on the passage quoted. It is apparent that the case was conclusively stated and decided by that portion of the paragraph quoted ending before the words "but assuming" to the effect that the Barber case was parallel in its facts with the Clark case. In other words, the Barber Lumber Company was an innocent purchaser and therefore the question of whether the entries were fraudulent or not became an immaterial issue, so far as I can discover. What follows in the paragraph quoted is of course based on the similar statement in the Budd decision. So far as it characterizes Steunenberg's activities as legitimate, it would appear, since he was not an entryman, that this was immaterial; but so far as the Court states that entrymen may without fraud make application and enter a timber tract with knowledge of an

offer from a timber operator to buy the lands at an increased price and with intent to take advantage of that offer, the statement of Judge Gilbert is very important. Its importance consists not in the fact that it is binding upon that court for the reasons stated, but because it gives the considered views of that tribunal upon the question of these entries and gives light both on what may be considered speculation and what may be considered entries under implied agreement under the circumstances stated; in other words, the Court of [76—43] Appeals would not find that the entries were speculative, nor would they find that an agreement to sell was to be implied. It is of course obvious that the issue of speculation was not made by the pleadings.

Coming back now to the opinion, the Court referred to the fact that there was evidence tending to prove that many of the entries in the Crooked River country were made in violation of the timber and stone act, "as was the case in United States vs. Clark; but the decided weight of the testimony is that such illegal action, if such there were, was induced by the locators Downs and Wells for their own individual advantage, and not at the instance of Barber and Moon or the appellee or to their knowledge." The Court then referred to the doctrine of the Maxwell Land Grant case and affirmed the decision, dismissing the bill.

Next in order for consideration in the chronological order in which the opinions were rendered in the lower court, we must consider the case of United States vs. Smith, commonly known as the Linn &

Lane timber company case, decided by Judge Bean in the District of Oregon, in 1910, 181 Fed. 545.

The bill alleges the making of a conspiracy between one Puter, Smith and others, whereby Puter should solicit and procure persons to make applications under the Timber and Stone Act under an agreement to convey the lands after their purchase from the Government for $100 per entry, the making of said agreements accordingly with the entrymen, etc. The gist of the fraud is thus seen to be the making of prior agreements. Later on amended bills were filed making the Linn & Lane timber company a party. I quote from the opinion:

> "The amended bills contain substantially the same allegations as the originals, with the addition that the Linn & Lane timber company was organized by Smith for the purpose of defrauding the Government and to consummate the fraudulent acquisition of title to the lands involved in these two suits; that the deed from himself to the company was not made in fact until after the commencement of these suits, but was antedated for the fraudulent purpose; and [77—44] that all the deeds were concealed and kept from the record in pursuance of such fraudulent purpose. Answers were subsequently filed denying the averments of the bill, and setting up as affirmative defenses (1) that Smith and the Linn & Lane timber company were purchasers of the property in good faith and without notice of any fraud; (2) that the decision of the Secretary of the Interior

directing that the claims pass to patent is conclusive on the Government in this suit; and (3) that the suits are barred by the statute of limitations because not commenced against the Linn & Lane timber company within six years from the date of patents. * * * There are substantially four questions presented for decision: First, whether the entries involved in these two suits were fraudulent; second, whether the defendant C. A. Smith was a party to such fraud or a purchaser of the property in good faith for a valuable consideration and without notice thereof; third, whether the Government is concluded by the decision of the Secretary of the Interior that the entries should be passed to patent; and, fourth, whether the suits are barred by the statute of limitations."

I shall consider at this time the decision only as to a portion of these questions, reserving other matters for other parts of this opinion. It appears that one Mealey had called to the attention of one McKinley the existence of valuable Government timber land in the eastern part of Linn County, which the Northern Pacific Railroad Company was then cruising preparatory to taking it up under the lieu land law. Mealey desired McKinley to devise some method to acquire the title. McKinley thereupon interviewed Puter, with whom he had previously been operating very largely in timber lands, and it was agreed to acquire the title by procureing persons to make timber and stone entries with

an idea of subsequent sale if capital could be interested.

"In pursuance of this understanding, they entered into an agreement with Mealey to pay him $10 for each claim he would show them or applicants furnished by them, and persons were thereupon solicited to make application for the land, Puter and McKinley agreeing to meet all expenses, pay the purchase price of the land, and each applicant from $75 to $100 for his trouble. Fifty-seven persons were thus procured to make applications to enter lands under the timber and stone act. Many of these persons resided in Albany and Salem, and some of them in Portland. They were taken in groups by McKinley or some of his assistants to Roseberg where they made the filings; the expenses incident to the trips being paid by McKinley. After the filings had been made, McKinley arranged for the publication of notices of final proof, and, when the proper time arrived, notified the applicants and took them to Roseberg, paid all their expenses, and upon the making of final proof, they were paid the stipend agreed upon. *It is* [78—45] *clear that none of the applicants took the land for their own use and benefit, but for the use and benefit of Puter and McKinley.*

"The same may, I think, be said of the entries involved in case 3319. They were all made through the defendants the Mealey Brothers and Thompson, with the understand-

ing on the part of the several entrymen that all expenses and the purchase price of the property would be paid, and that each applicant would receive $50 for his trouble. It is true there was no express agreement with the several applicants in either case that the entries should be made for the use and benefit of another, but this is the effect of the entire testimony. As Puter states in his testimony, the conspirators studiously avoided entering into such an express contract or agreement, for they knew it would be such an evidence of fraud as would invalidate the entry, but caused it to be reported, and the applicants to be advised by other parties that, if they would make the applications, they would receive upon making final proof the stipulated sum, and they acted on such understanding in making the applications and subsequently conveying the property as directed by Puter and McKinley and Mealey."

Reference may here be conveniently made to what the Court says as to the effect of the decision of the Secretary of the Interior directing that these claims be passed to patent. Of course the contention was that since the Secretary was fully advised of the facts or at least sufficiently advised to give ample notice of the existence of facts subsequently disclosed at the trial, the Government could claim no relief on the ground of fraud since under the law of deceit it had not in fact been deceived. The Court dismissed this contention with the statement

that the affidavits of the several entrymen and of Puter and McKinley accompanying the reports of the special agents upon which the Secretary made his decision passing the claims to patent, were false.

> "Having thus induced the Secretary of the Interior to pass these claims to patent upon false and fraudulent testimony, with knowledge of its character, it certainly cannot be successfully contended that the decision of that officer is conclusive upon the Government."

It would seem from what has been quoted that the trial court found in favor of the Government on the ground of prior implied agreement to convey after purchase. This, it will be remembered, was in accordance with the allegations of the bill. The opinion is, of course, therefore, of no assistance in determining the limits of meaning of the word speculation. This case [79—46] has been especially urged on my attention by the Government as one parallel to the case at bar. I have examined the transcript as it appears in the record of this case in the United States Circuit Court of Appeals for this circuit, though I did not feel under obligation to examine the very voluminous transcript of testimony throughout. The decision of the Court is one upon facts. A decision on facts, unlike a decision on matters of law, is not to my mind controlling as a precedent. In other words, if on reading the testimony of a particular entryman in the Smith case, my reason and conscience did not impel me to find an implied argument, I would not do so, even

though the learned judge in that case felt clear in his own mind in the matter. In addition to that, no two cases of fraud are entirely alike. Judge Bean had heard the entire testimony and not read merely a part of it, and had in addition the advantage of seeing the witnesses on the stand. The course of the decisions, abandoning for all practical purposes any construction of the word speculation wider than that of a prior agreement, has forced the courts at times into pretty narrow corners, when one considers the rules of decision laid down by the Maxwell Land Grant case. This principle may, however, be deduced from this case, that where an entryman upon all the facts is seen to be merely a dummy acting without conscious volition, the willing tool, for a price, of speculators in public land, the Courts will be quick to imply an agreement, even though an express agreement cannot be found to exist. There can, however, be no hard and fast rule as to what will constitute such an entryman; each Judge must determine that for himself. In considering what the learned Judge says in this case one must bear in mind his opinion one year earlier in the Barber [80—47] Lumber Company case already quoted.

In May, 1912, the Court of Appeals of this circuit in an opinion written by Judge Gilbert, Linn & Lane Timber Company vs. United States, 196 Fed. 593, said:

> "A careful consideration of the record satisfied us that the learned Judge of the court below was quite right in finding that all of the entries

in question were fraudulent and the proofs in support of them false and fraudulent, and in holding that the defendant C. A. Smith, if not actually cognizant of the conspiracy in pursuance of which the entries and proofs were made, was at least bound by the acts of his agent Kribs, who, according to the evidence, was an active participant in the frauds upon the Government."

United States vs. Belts, 192 Fed. 708, was a decision by Judge Wolverton in the Circuit Court of the District of Oregon, rendered December 4, 1911, in two cases brought to cancel certain homestead and timber and stone patents. The bills charged

"that the defendant, with a view to obtaining the title to these lands, procured the patentees to make false and fraudulent homestead and timber and stone entries * * * with the understanding and agreement entered into with each of said entrymen, at the time and before the entries were made, that he or she, as the case might be, should convey the land to the defendant when the title was acquired."

The Court found that the proofs showed that the entries were fraudulently made,

"with the tacit, if not the express, understanding that the title in each instance, when acquired from the Government, should be conveyed to the defendant, and was thereby to inure to his benefit."

The Court reviewed the evidence which showed as to the timber and stone entries certain evidence

of prior agreements for purchase and sale. It also appeared that the defendants furnished the descriptions, paid all expenses in making the entries and going to the land, and the Government price. As to defendant's denial that there was an agreement, the Court said:

> "If it be that there were no such express agreements, there must have been a tacit agreement in each case. Defendant was the only person vitally interested in procuring the titles, and he was paying all the expenses, even to the extent of the purchase price of the land from the Government; and was it not expected, and even understood, that he was finally to acquire the title by purchase from the entrymen, and this on an understanding reached at or before the time the entries were made? It seems not within the bounds of reason that it could be otherwise." [81—48]

The Court thus finds on the evidence that if there was not an express agreement there was certainly an implied agreement. It is a decision on the facts and can be of no particular assistance to us in this case except by way of illustration of the extent to which a court may feel justified in going to prevent suspected fraud by finding an implied agreement.

United States vs. Booth-Kelly Lumber Company apparently not reported below, was a decision of the Circuit Court of Appeals of the Ninth Circuit, rendered February 24, 1913, in an opinion by Judge Gilbert, 203 Fed. 423. The bill asks can-

cellation of patents issued under the Timber and Stone Act—

> "on the ground that the initial applications of the patentees had been fraudulently made by them for the use and benefit of the Booth-Kelly Lumber Company, and with the understanding at the time when they were made that the entrymen should each convey the land so entered by him to said company. The bill alleged that that company paid and advanced all of the fees, costs, and expenses and purchase price of said land and paid to each entryman $100, and received from each a deed."

The answer, among other things, affirmatively alleged that the charges of fraud in the entry were made while the matter was in the Land Office and investigated by the Interior Department, a full hearing had, and that it was found that the entries were not fraudulent. The Court below entered a decree cancelling one patent and dismissing the bill as to the others. Both parties appealed. Judge Gilbert calls attention to the fact that the entrymen were either relatives or employees of the lumber company. The opinion reviews the oral testimony and calls attention to certain significant entries in the company's books and to significant changes in the company's pleadings. The facts are too complicated to be here set forth, but seem to show that the entrymen had either made an express agreement, of which there is evidence, or that the entrymen were mere dummies acting in such a way

that it could readily be implied. In reversing the opinion of the lower court, Judge Gilbert said:

> "These facts and circumstances, while perhaps they do not amount to a demonstration of the truth of the allegations of the bill, result in a very decided preponderance of the evidence in favor of that conclusion. [82—49] and they are sufficient in our judgment to overcome all the presumptions that attend the issuance of the patents, and are sufficient to meet the requirement of the rule that in a suit to set aside a patent the testimony on which it is done must be clear, unequivocal, and convincing, and must be more than a bare preponderance of the evidence, which leaves the issue in doubt. The findings in the court below were made upon evidence which had been taken before an Examiner, and not in open court, and they are not attended with presumptions in favor of findings which are made upon conflicting testimony, where the trial judge has the opportunity to observe the demeanor of the witnesses."

The Court made no reference in its opinion to the issue framed that the matter had been fully examined by the Interior Department and that therefore the Government was not deceived.

I come now to the latest expression of the law in the Circuit Court of Appeals of this circuit, namely, the case of United States vs. Kettenbach, rendered October 21, 1913, since this case was argued and submitted. The opinion was written by Judge Morrow. The case came from the Cir-

cuit Court of Idaho. The evidence was taken before Special Examiners, the opinion below being written by Judge Dietrich, rendered March 21, 1912. It is apparently not reported. I have, however, examined the transcript of the record filed in the Circuit Court of Appeals, which is very voluminous, in an endeavor to obtain the views of both courts as to the law and as to the application of the law to given facts. I have not attempted to read the record in its entirety.

Briefly, the bill alleged that Kettenbach and others, including one Robnett, conspired together to acquire timber lands and that in pursuance of the conspiracy, through Robnett and others they entered into agreements with numerous entrymen whereby the defendants agreed to buy and the entrymen to sell timber and stone claims to be thereafter entered. The plan included the invitation of entrymen in some cases to enter with an assurance that all expenses would be paid and a means of borrowing the purchase money effected. Robnett, the locator, made a locator's fee in each case. At or about the time of final proof, generally speaking, mortgages were given, sometimes to [83—50] Kettenbach, sometimes to others, to secure money advanced, the locator's fee and a bonus to the lender of the money. The testimony as to the circumstances preceding the entry differed in detail in each particular case. In due course the greater part of the claims were conveyed either to Kettenbach or others, and the question of purchase for value without notice was presented. Judge

Dietrich, for various reasons stated by him, gave little credit to the testimony of Robnett, who appeared as a witness for the Government. He examined the testimony as to each entry carefully, with a view to determining whether or not an express or implied contract was unequivocally shown, and considered also the question of innocent purchase. Accordingly, a number of the patents were ordered cancelled and as to others the bills were dismissed.

It appears that in the Court of Appeals the Government raised, in addition to other grounds of invalidity, the question of fraud in the entries on account of their speculative character. On this question Judge Morrow said:

> "1. It is contended by the complainant in this court that the patents described in these three cases should be declared fraudulent and void on the single ground that the evidence establishes the fact that the entryman applied to purchase the lands described in their entries for the purpose of speculation, section 2 of the Act of June 3, 1878, does require the entryman to set forth in his sworn statement, among other things, 'that he does not apply to purchase the same (the land) on speculation, but in good faith to appropriate it to his own exclusive use and benefit.' The definition of the word 'speculation' is given by Webster as 'the act or practice of buying land, goods, shares, etc., in expectation of selling at a higher price.' It may be conceded that when the entrymen made entry

of the lands in controversy it was with the expectation that they would sell them at a higher price; but we are not required to dispose of these appeals upon these words of the statute. The cases are not so presented in the bills of complaint and were not so tried in the court below. The charge in the bills of complaint is, in substance, that at the time the entrymen made application to purchase the lands described in their entries, they had made an agreement with certain persons by which the title to the land which they were to acquire from the United States should inure to the benefit of persons other than themselves. Whether this charge was true or not was the question at issue in the court below, and to this issue the voluminous testimony we find in the record was directed, and is now before the court for the purpose of determining these appeals. It is this question, and [84—51] this question alone, we must determine with respect to the 61 patents assailed in these cases."

Judge Morrow then proceeded to consider the case on the basis of prior unlawful agreements of the entrymen and first summarized the law as follows:

"2. In a number of recent decisions, the Supreme Court of the United States has determined just what acts may be construed as fraudulent in cases of entries upon claims under the timber and stone act of June 3, 1878, as amended and extended by the act of August 4, 1892. In these decisions, the law has become

well settled, that the act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the Government, or restrict in the slightest his power of alienation; that all that it denounces is a prior agreement, the acting for another in the purchase; that if when the title passes from the Government no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied; and that an applicant is not required, after he has made his preliminary sworn statement concerning the *bona fides* of his application and the absence of any contract or agreement in respect to the title, to additionally swear to such facts on final proof. (United States vs. Budd, 144 U. S. 154; United States vs. Williamson, 207 U. S. 425.) In the cases which we now have before us for decision, the testimony is very voluminous. A great portion of it relates to acts of the entrymen, and of the defendants, or some of them, at the time of making final proof, or prior to that time and subsequent to the making of the original application to purchase the land. Under the decisions just referred to, this testimony was only admissible and can only be considered by this court in so far as it tends to establish the fraudulent purpose of the entrymen with respect to the land in controversy at the time of the original application."

The Court then went on to consider the weight to be given to the testimony of Robnett. In this

probably is to be found the chief element of difference between the views of the lower court and that of the appellate court. The Court of Appeals agreed with Judge Dietrich that Robnett's testimony as that of an accomplice was to be received cautiously and scrutinized with care and was also not free from contradictions and mis-statements. But the Court of Appeals found in the testimony of the entrymen and the various circumstances otherwise proved, a much greater degree of corroboration of Robnett's testimony than the lower court was able to find. Upon this basis it examined the testimony as to each entry in detail with a view to determining whether a prior agreement was shown and announced [85—52] its results in general language. The conclusions of Judge Dietrich in favor of the Government were affirmed and in addition thereto a number of entries determined by the lower court to be valid were by the Appellate Court declared to have been made under an agreement sufficiently shown.

I have examined the testimony as to a number of these entries taken at random. No useful result would be attained by setting forth an analysis of this evidence here. In many cases the agreement had to be implied. The only comment to be made is that it presented a state of facts upon which two courts, able and intelligent, conscientiously considering the facts, might differ in opinion. This to my mind with clearness and finality demonstrates the logical and practical weakness of the doctrine first announced in the Budd case that only

a prior agreement will invalidate a timber and stone entry. To anyone who should turn from a reading of the statute to the record in this and kindred cases, the conviction would surely appear that the Government had been defrauded. But when either by decisions of courts or by the allegations of pleadings the Court finds its impression of fraud limited and defined within the limits of proof of prior agreements to convey, it is inevitable that decisions will become conflicting and uncertain. [86—53]

After this extended review we may summarize the results, perhaps not with entire confidence and with still less satisfaction, but with some approach to clearness. For brevity, as heretofore in this review, I speak of an entry as "speculative" which violates the oath of the entryman "that he does not apply to purchase the same *on speculation,* but in good faith, to appropriate it to *his own exclusive use and benefit.*"

(1) In the strictest, and, it would seem, its most obvious sense, an entry is speculative where at the time the sworn statement is made the entryman intends to sell the land thereafter at a profit, and does not intend to use the land itself, exclusively or at all, for timber. It *may* conceivably be open to the courts under proper pleadings to so declare, but it is definitely decided to the contrary by the Land Department in the Donahue case (*supra,* pp. 15, 16). Under such circumstances, it would follow that the courts would adopt the construction of the Land Department, since obviously a patent

could not be cancelled for fraud, if it would have been issued by the department on such a state of facts. And it has been seen, that, independently of the Land Department, the courts have many times, beginning with the Budd decision, said that an entry made with intent to sell at and for the purpose of the profit involved is not illegal. It is true that in no such case was the question at issue under the pleadings. It is, however, believed to be unlikely, considering the frequent expressions of the Court, and the effect of the attitude of the Land Department, that this view of the meaning of the word "speculation" can be now deemed open.

(2) A more limited definition of "speculation" is given by the Secretary of the Interior in U. S. vs. Bailey (*supra*, pp. 11–15), followed in the Donahue case, and approved by the Supreme Court in Diller vs. Hawley. This is that an entry is speculative when the entryman "has first satisfied himself that the entry can be sold [87—54] at a profit," and has thereupon entered "for the sole purpose of securing the profit thus in view." This seems to imply knowledge of an existing purchaser and of a price, and an intent to transfer the land promptly upon its acquisition. It does not necessarily imply an agreement with the purchaser. It is contrary, however, to the well-known utterance of the Budd case, repeated many times and by the Court of Appeals as late as the Barber case. This view of the Bailey case, however, is rendered somewhat uncertain by emphasis there and in the Donahue case upon the fact that the entries were

"planned, procured and engineered by someone for his profit, using the entrymen as his instruments." This latter situation has usually been given weight, however, if at all, as furnishing foundation for an implied agreement. In other words, it is possible to view the case as one regarding "speculation" as existing where an agreement is shown. Such cases, however, drive the courts into too narrow corners in finding implied agreements, often, I suspect, where they would not be so implied if the case did not arise under the Timber and Stone Act. It would therefore be better to regard such entries as speculative. We may say that, under proper pleadings this construction of the word "speculation" is at least a possible one under the authorities.

(3) A third view regards an entry as speculative only in the presence of an express or implied agreement. In its natural meaning, speculation connoting risk, is opposed to the implication of certainty of obligation involved in the words contract or agreement; but in the sense used in the land laws, implying intent to transfer to another it of course includes a case where an agreement is present, though properly of broader significance. Obviously, this view gives no substantial effect to the first part of the entryman's oath. It is, however, the effect of most of the decisions, particularly the opinion in the Budd case. And it is to be noted that in the Detroit case, the only one [88—55] before it where the issue of speculation as well as the issue of agreement was raised by the

pleadings and by the opinion of the Circuit Court of Appeals, the Supreme Court made no distinction and apparently considered the two issues the same, viz., whether an *agreement* was shown. It may well be argued that on the authorities, this is the only view possible of speculative entries.

(4) Where prior "contracts or agreements" are shown in express form, little need be said. They need not be in writing to satisfy the statute of frauds. They cannot possess legal obligation, since they are by this statute forbidden. In other *words,* the term "contract" is inapplicable and superfluous.

The difficulty comes in determining when agreements are to be implied. But this is a difficulty of fact only upon which courts will differ. The principles must be the same as in the general law of contracts. The facts must show that promises were intended by the parties. Mere expectations of future acts or happenings or intentions in that regard, are not an agreement that they shall happen. The minds of the parties must have met definitely and certainly in a mutual consent on the part of the entryman to sell and convey the land to the other for a definite price, and on the other side to buy and pay that price. (See generally U. S. vs. Richards, *supra,* pp. 28–30).

(5) An agreement is not to be implied from the fact that the timber operator has announced his willingness to buy at an advance over the Government price and the entryman has made entry on the faith thereof, for the purpose of selling to him.

(U. S. vs. Budd, *supra,* p. 9, U. S. vs. Richards, *supra,* p. 30, U. S. vs. Barber, *supra,* pp. 38, 39, 42.)

Nor from the fact that a sale or contract of sale took place after entry. (U. S. vs. Budd, *supra,* p. 9, U. S. vs. Bailey, *supra,* pp. 11, 12, U. S. vs. Williamson, *supra,* p. 32, U. S. vs. Barber Co., *supra,* p. 38, U. S. vs. Clark, *supra,* p. 24.) [89—56] Nor from the fact that descriptions were furnished and assistance given in visiting the land entered (U. S. vs. Clark, *supra,* p. 24, U. S. vs. Barber, *supra,* pp. 37, 38), nor from the fact that the entryman has borrowed money from the timber operator to assist in effecting his entry (U. S. vs. Clark, *supra,* p. 24, U. S. vs. Richards, *supra,* p. 30; U. S. vs. Barber Co., *supra,* pp. 38, 42). But such facts may have an evidential value, in connection with all the facts in evidence, to prove a prior agreement (U. S. vs. Richards, *supra,* p. 31, U. S. vs. Detroit, *supra,* p. 21). Where from the facts the entryman appears a mere dummy, an employee, acting without personal initiative or volition, to earn a fixed stipend for his trouble, the Court have been ready in finding an implied agreement to convey the title (U. S. vs. Olsen, *supra,* p. 26, U. S. vs. Smith, *supra,* p. 44.)

In finding a prior agreement, express or implied, the Court must bear in mind the strict requirements of proof laid down by the Supreme Court in United States vs. Maxwell Land Grant Co., 121 U. S. 325, 381, frequently hitherto referred to and repeated in nearly every case involving the cancellation of patents. I quote (italics mine):

"We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument, for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants the patents, and other solemn evidences of title emanating from the Government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the Government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon

> the hazard of [90—57] successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

The application of the above rules results often in narrow distinctions between cases apparently similar. Had the courts and the Land Department from the beginning adopted a broader interpretation of the Act, the problems arising would be simpler and their disposition logically more satisfactory.

In cases under the Timber and Stone Act, the requirement of the Maxwell case that the proof must be "unequivocal" does not, it is conceived, mean that a possible consistency with innocence is sufficient to defeat the bill if the Court is otherwise convinced of fraud. (U. S. vs. Booth-Kelly Co., *supra,* p. 50, per Gilbert, J.)

The fact that the parties accused of fraud in the form of a prior agreement were aware of the law, has been considered by some courts as a matter of sound reasoning, and, consequently, as a presumption of law, a potent factor in deciding that the illegal agreement was not made. This view was expressed by the Supreme Court in United States vs. Budd (*supra,* p. 9), and by the Circuit Court in United States vs. Detroit Timber Co., *supra,* p. 20) and in United States vs. Clark (*supra,* p. 25). It was not given controlling weight by the

Supreme Court in the Detroit case nor by the lower court in United States vs. Smith (*supra,* p. 46). [91—58]

SUMMARY OF PLEADINGS AND REPORT ON PROPOSED AMENDMENT OF THE BILL.

A. THE PLEADINGS.

The pleadings in all these consolidated cases are in general identical, being upon printed forms with spaces for the insertion of differing details in typewriting. The bills of complaint show signs of having been hastily and rather carelessly drawn. A demurrer was interposed, together with exceptions, both of which were overruled. Since the argument has been without reference to the points made by the demurrer I pass them by.

The bill of complaint filed June 7, 1910, alleges the entry by Edward L. Cooksey on August 2, 1902 of the Southwest quarter of Section 15, Township 25 North, Range 10 East, M. D. M. It sets forth in the first four paragraphs of the Bills Cooksey's compliance with the forms prescribed by law and the regulations of the Interior Department for the entry of the land in question and the issuance of a Receiver's receipt on August 16, 1902. All these allegations are admitted by the answers.

Paragraph V alleges the publication of the Register of the Susanville Land Office of the notice required by statute and of the making of final proof by Cooksey and his witnesses. It then alleges that the testimony on final proof was false in that the applicant did not intend to secure the said land

for his own use and benefit, but for the use and benefit of others, to wit; Charles E. Gregory and the Curtis, Collins & Holbrook Company; this latter allegation presents an immaterial issue under the decision in United States vs. Williamson, *supra,* page 32, and will not further be regarded. This paragra*gra*ph further states that the applicant complied with all the forms of law and that his proofs were accepted by the officials of the United States as regular and sufficient for the issuance of a patent and that the patent thereupon was executed and issued upon August 28th, [92—59] 1904. The paragraph further alleges "that the complainant and all and each of its officers accepted said proofs without any knowledge or notice of their falsely (falsity) or of the fraud herein set out and prior to the issuance of said patent had no notice or knowledge of said fraud, but on the contrary believed the said statements of said applicant to be true and believe (d) that his application was made in good faith."

I assume this as intended to allege the reliance of the Government on the statement in the preliminary sworn statement as well as other proofs and the issuance of the patent in reliance thereon. The answer admits all the allegations of paragraph V except that it takes issue on the matters previously referred to as immaterial and also on the matter last hereinabove quoted.

Paragraph VI is as follows:

"That the said entry hereinbefore described was not made in good faith under the laws of

the United States nor was said patent secured for the exclusive use and benefit of the said applicant and affiant, but at the instance and in the interest of other parties; that said statement that the said applicant applied to purchase said land for his own exclusive use and benefit was false or untrue in that said applicant before the filing aforesaid had agreed to convey the same to Charles E. Gregory and the Curtis, Collins & Holbrook Company. That the other defendants hereinbefore the acquisition of title by them or either of them had full notice and knowledge of said fraud. That on, to wit, the 25th day of October, 1902, said applicant and affiant did convey the land hereinbefore described to Charles E. Gregory, defendant aforesaid; that said defendant Charles E. Gregory did on, to wit, the 2d day of May, 1903, convey the said land to the Curtis, Collins & Holbrook Company, defendant. That the said Curtis, Collins & Holbrook Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. That the said Charles E. Gregory and the said Curtis, Collins & Holbrook Company knew of the fraud hereinbefore described, and did request and procure the said Edward L. Cooksey to make the entry aforesaid and obtain the patent aforesaid for their use and benefit; that they did know that said Edward L. Cooksey was not making the said entry for his own exclusive use and benefit,

but for their use and benefit, and the said defendants, Charles E. Gregory and the Curtis, Collins & Holbrook Company knew that the said patent had been obtained by the false statements of the said Edward L. Cooksey, as hereinbefore described."

The answers (a separate answer being filed by the Curtis, Collins & Holbrook Company and by the entryman Cooksey) deny all the allegations of fraud or knowledge of the fraud, but [93—60] admit the deed by the entrymen to Gregory and by Gregory to the Curtis, Collins & Holbrook Company on the dates mentioned.

Paragraph VII of the bill contains the usual allegation as to fictitious persons made defendants. Paragraphs VIII and IX refer to the adverse claims of defendants and the cloud on the Government title in the shape of the patent and the said deeds, Paragraph X prays leave to refer to all the papers and proceedings in the Land Office and waives an answer under oath, and the prayer asks the cancellation of the patent, forfeiture of the purchase money and the establishment of the title in the United States, with general relief.

The answer of the Curtis, Collins & Holbrook Company has a separate defense. It sets forth the incorporation of the defendant corporation in the State of California, organized August 15, 1902, and then in detail the proceedings whereby the patent was issued to Edward L. Cooksey, and the land subsequently conveyed by him to Gregory to the company.

Paragraph IX pleads that the Curtis, Collins & Holbrook Company after issuance of the Receiver's receipt purchased the land in good faith and paid therefor a valuable consideration without knowledge or notice of any defect in the title or of the alleged fraud. The laches of the Government is set forth but need not be further considered for the reason that laches does not run against the United States. Paragraph XIII of this separate defense in the answer, setting up the statute of limitations, alleges: "That said patent mentioned in said bill of complaint was not issued by said complainant within six years before the said suit was brought." This defense is further and otherwise stated in language to the effect that the cause of action "did not accrue within six years before the said bill was filed and the subpoena and process issued thereon, served on this defendant." [94—61]

It becomes necessary now before going further to particularly examine the allegations of paragraph VI, heretofore quoted, for the purpose of determining what issue of fraud is made by the bill. It begins "that the said entry hereinbefore described was not made in good faith under the laws of the United States nor was said patent secured for the exclusive use and benefit of the said applicant and affiant, but at the instance and in the interest of other parties"; this much of the bill might conceivably be thought to refer to a charge that the entry was speculative as well as conceivably made under agreement. But the pleader has resolved

this doubt in what immediately follows. Following the rule that fraud must be circumstantially alleged, he next states following the semicolon after the last quotation "that said statement that the said applicant applied to purchase said land for his own exclusive use and benefit was false and untrue *in that* said applicant before the filing aforesaid had agreed to convey the same to Charles E. Gregory and the Curtis, Collins & Holbrook Company. That the other defendants hereinbefore the acquisition of title by them or either of them had full notice and knowledge of said fraud." This clearly defines the fraud as the making of an agreement prior to the filing of the application. It defines and confines the meaning of the general terms in the first statement quoted "for his own exclusive use and benefit" to the falsity of the application in the shape of a prior agreement. Then comes rather out of logical order in the bill the chain of title and the allegation as to the corporate capacity of the Curtis, Collins & Holbrook Company. Then follows the following: "That the said Charles E. Gregory and the said Curtis, Collins & Holbrook Company knew of the fraud hereinbefore described, and did request and procure the said Edward L. Cooksey to make the entry aforesaid and obtain the patent aforesaid for their own use and benefit; that they did know that said Edward L. Cooksey was not making the said [95—62] entry for his own exclusive use and benefit, but for their use and benefit, and the said defendants Charles E. Gregory and the Curtis,

Collins & Holbrook Company knew that the said patent had been obtained by the false statements of the said Edward L. Cooksey as hereinbefore described." The import of this paragraph seems to be to allege again what had previously been alleged before, that Gregory and the company had knowledge of the fraud alleged and "hereinbefore described." The language "and did request and procure the said Edward L. Cooksey to make the entry aforesaid and obtain the patent aforesaid for their use and benefit," in isolation is an allegation of substantive nature which might conceivably be regarded as an effort to state an act of fraud which would come under the decisions as to speculative entries. Taken, however, in connection with the rest of the paragraph which is evidently intended to allege the knowledge of the grantees, its purpose and intent is seen, though carelessly stated, to show how it was that Gregory and the company knew of the fraud, that is, in that they had previously requested and procured the entry. It must be taken also in connection with the substantive allegation in the same paragraph to the effect that the falsity in the sworn statement consisted in the fact that he had made a prior agreement to convey to Gregory and the company. It follows, therefore, that so far as the original bill is concerned, the issue of fraud turns on the allegation that the applicant had agreed to convey the land to the two defendants named. There is no allegation upon which we can here consider whether the entry was a speculative one as I have defined the mean-

ing of that term in my review of the adjudicated cases.

It is further to be noted that the fraud alleged is fraud committed by *the entrymen.* There is no allegation of conspiracy nor is there any allegation that Gregory or the Curtis, Collins & Holbrook or anyone else committed any fraud. [96—63] The acts and state of mind, therefore, of the entrymen are in each case the only matters in issue, so far as fraud is concerned. As to Gregory and the company, it is simply charged that they took with notice of the fraud.

An amendment was allowed by the Court to the bill during the trial before the Master by adding a paragraph to be numbered 9 and 9½, concerned with the issues raised regarding the statute of limitations. A statement of the allegations of the pleadings on this amendment may conveniently be reserved until the discussion of the statute of limitations.

IV. B. THE PROPOSED SECOND AMENDMENT TO THE BILL AND THE ORDER OF REFERENCE THEREON.

After most of the evidence had been heard, the Master suggested to both parties certain defects in the proof, and being then suspicious that the Government's bill of complaint counted only on a prior agreement and that difficulty would be found in finding an agreement on the facts, but being at the same time of the opinion, without being advised of the state of the law, that much of the proof showed entries made contrary to the Tim-

ber and Stone Act, suggested to the counsel for the United States the advisability of considering an amendment of the bill so as to cover the question of speculation in the entries (Tr. 3356 *et seq.*). Defendants' counsel gave notice that he would object to such new issue being raised on the ground that the case had been tried on the theory that they alleged a prior agreement. Nothing was done in this regard until September 26, 1913, when the Government filed a notice of motion for an order to file the second amendment to the bill of complaint. This motion came on for hearing before the Court on September 29, 1913, the same day set by the Master for the taking of some additional evidence and the oral argument of the cause. On that day on motion of the Assistant United States Attorney and by consent of the defendant, it was ordered that the motion be referred [97—64] to the undersigned, the Standing Master, "to hear said motion and to report his conclusions thereon." Accordingly the parties were heard in behalf of the motion at the same time as the merits of the consolidated cause were argued. The motion was to insert in place of paragraph VI in the original bill the following:

> "That said sworn statement and application made in the taking up of said land was false and untrue in this, that the said applicant did apply to purchase the land described in said complaint and in said sworn statement and said application on speculation and not in good faith to appropriate it to his own use and

benefit, but for the use and benefit of Charles H. Holbrook, Sr., Charles H. Holbrook, Jr., Charles E. Gregory, George E. Tuman, T. D. Collins, E. S. Collins, D. G. Curtis, J. G. Curtis, and the Curtis, Collins & Holbrook Co., and that at the time of making said sworn statement the said applicant had made an agreement or contract, either directly or indirectly, with said Charles H. Holbrook, Sr., Charles H. Holbrook, Jr., Charles E. Gregory, George E. Tuman, E. S. Collins, T. D. Collins, D. G. Curtis, J. G. Curtis, and the Curtis, Collins & Holbrook Co., which said agreement or contract was made, by and through the agency of third parties acting in the interest of the said Charles H. Holbrook, Sr., Charles H. Holbrook, Jr., Charles E. Gregory, George E. Tuman, E. S. Collins, T. D. Collins, D. G. Curtis, J. G. Curtis, and the Curtis, Colllins & Holbrook Co., and that said applicant in the making of said application and sworn statement did not expect to obtain the title to said land for his own use and benefit but for the sole purpose upon receiving a Receiver's final receipt, of executing a deed conveying the title to said land to some person to be thereafter designated, and receive in consideration therefor approximately $100 more or less over and above the expenses of taking np said land; that the Curtis, Collins & Holbrook Co., and the Pennsylvania Lumber Co., are each corporations organized and doing business under

and by virtue of the laws of the State of California; that the Curtis, Collins & Holbrook Co. claims an interest in said land adverse to the complainant, but said claim is wholly without right and that whatever interest the said Curtis, Collins & Holbrook Co., may have in said land was obtained under the patent hereinbefore set forth and with knowledge of the fraud hereinbefore alleged."

I am of the opinion after careful consideration of the matter that the motion should be denied and I so find and report. My reasons are as follows:

First, the proposed amendment is uncertain in that it does not clearly appear from it that the entryman's sworn statement was false on each of the two grounds that it was made on speculation and in pursuance of a prior agreement, or that it was speculative because of the prior agreement. The latter seems to be the view of the Government's counsel (Tr. 3611–12). [98—65]

Second, if it is intended by the offered amendment to plead a case of speculative entry as distinguished from a prior agreement, I am of the opinion, after careful, and at times, doubtful, consideration, that it does not conform to the proofs. My view in first suggesting that such an amendment might be proper was that the whole facts of the entries had been pretty well gone into and that the Court had all the material necessary to determine whether the entries were speculative or made under contract. Defendant's counsel contended, however, that in his cross-examination he had de-

voted himself entirely to proving the nonexistence of a prior agreement and nothing more. My doubt in this regard, however, is resolved by the views of the Circuit Court of Appeals for the Ninth Circuit in United States vs. Kettenbach, *supra,* page ——.

In that case, although an inspection of the record of testimony shows that the matter was gone into fully in the same way as here, the complaint being framed on fraud in making a prior agreement, Judge Morrow said that the question of speculation was not in issue because the case had neither been pleaded *nor tried,* on that theory.

Third, if the amendment is designed to plead a prior agreement as a basis of the fraud, it is to be sure pleaded with more detail than the original bill, but would entitled the Government to no relief that it could not obtain under paragraph VI of the original bill. It therefore seems unnecessary.

FACTS COMMON TO ALL CASES.

In 1896 George E. Tuman, a timber cruiser, went into Plumas County to examine the timber and to determine whether any considerable amount of it was public land. He did not do anything further in that regard until the spring of 1901. In 1898 he first met Charles H. Holbrook, who was then manager of a mill at Dunsmuir in which Tuman was employed. In 1901 Tuman again resumed his investigation of timber lands in Plumas and Tehama Counties. At that time he was worth $9,000 or $10,000. His [99—66] purpose in making the trip in 1901 was to cruise as much vacant land as

possible with a view to inducing some capitalist to furnish funds to acquire land from the Government by the use of forest reserve lieu scrip. In this cruise and enterprise he associated with him one Golden, who, however, had no money. In June, 1901, having gotten together a considerable list of lands, they began to consider someone to aid them in securing financial assistance, and to this end Holbrook was approached. Holbrook himself at that time had no money but had operated considerably in timber and was relied upon to put them in touch with the necessary capital. Thereupon Golden and Holbrook made a trip in the summer or fall of 1901 to Wisconsin with a view to securing needed assistance. The trip was a failure. Thereupon Golden was bought out.

In November of 1901 Holbrook made a second trip East, this time to Warren, Pennsylvania. While there he met D. G. Curtis, who introduced him to J. G. Curtis and T. D. Collins. Curtis and Collins were men of means who were interested in timber and other enterprises in Pennsylvania. Holbrook showed them his list of lands which Tuman had cruised, with the estimates of timber upon it, and proposed that they should buy the land from him at $7.50 an acre, and furnish him the necessary money with which he could buy what is commonly known as forest lieu scrip, then worth about $4.00 or $5.00 an acre, the land to be turned over to Curtis and Collins and the difference between the price of the scrip bought by their money and the price they paid being Holbrook's profit. During

the course of the negotiations, Tuman, at Holbrook's request, wired Holbrook that a named third party was ready to make the purchase on the same terms proposed. This telegram was false and intended merely as a means of accelerating the consummation of a bargain with Curtis and Collins. The list of lands which Holbrook had amounted to something over 42,000 acres. Accordingly, Holbrook's [100—67] proposition was accepted and a contract in writing executed, after which Holbrook returned to the State of California. Later it appears that the original agreement in some of its details was unworkable and, accordingly, in December, Holbrook returned to Pennsylvania and a new contract was executed between him and Curtis and Collins under date of December 19, 1901. This agreement, Defendants' Exhibit "B," transcribed in full in the record at page 2728 *et seq.*, is of such importance as showing the relations of the parties that I will set forth its provisions in some detail.

By this agreement Holbrook agrees to sell to and have the title thereto vested in Curtis & Collins, their heirs or assigns, in the manner set forth, 42,380 acres of timber lands for $7.50 an acre, making the total cost of said lands to the second party plus $2,250 interest the sum of $315,600. Holbrook agrees to obtain the forest reserve base land by purchase in the amount named and make selection of the 42,380 acres described in his list of cruised lands attached as a schedule, " the title to the same to be secured by the said parties of the

second part, Curtis and Collins, their heirs or assigns." It was provided that the scrip should be conveyed to G. Howard Thompson as a trustee, Thompson being an employee then of the Bank of California, who were bankers for both parties. Curtis and Collins agreed to deposit in the Bank of California on December 31, 1901, the sum of $200,000 to purchase the necessary forest reserve scrip, to be applied by the bank on the written directions of Holbrook, together with the certificate of Charles A. Shurtleff, attorney at law, as to the title. Further funds were to be deposited as needed. Mr. Thompson was at Holbrook's request to deed the base lands to the United States and make application for the lieu tracts in the attached schedule, Holbrook furnishing the descriptions. It further provided as follows:

> "The trustee, providing he shall have received the notice from Holbrook that he has been fully paid hereinafter provided for, shall at the request of Curtis and Collins either befor or after receipt of patent therefor, deed said lieu lands to Curtis and Collins, their heirs or [101—68] assigns, or to any person or corporation they may in writing jointly direct * * * Curtis and Collins agree that when Holbrook shall have obtained the 42,380 acres of forest reserve and have had the same deeded to the trustee, or when he shall have secured the title to 42,380 acres of timber land in Plumas County and Tehama County by having the forest reserve deeded to said trustee,

or otherwise procured the title thereto, or sooner, if the parties to this agreement consent, to form a corporation under the laws of California having for its purpose the purchasing and acquiring of said and other timber lands and cutting the timber thereon and manufacturing and selling the same."

The corporation was to have a capital stock of $500,000 divided into 5,000 shares. It was further provided that:

"On the completion of the incorporation the second parties (Curtis and Collins) shall deed and convey, or cause to be conveyed to said corporation all of said 42,380 acres and receive in full payment thereof 3,156 shares of the capital stock fully paid up and issued in their name; and the balance, 1,844 shares, shall remain in the treasury of the corporation and shall not be sold for less than par."

In other words, the land concerned was to go first to a trustee when directed by Holbrook that he had been paid, was to deed the lieu lands to Curtis and Collins, or, if the corporation had been formed, to the corporation provided they directed him to do so. The corporation was to be formed as soon as the requisite quantity of forest reserve had been conveyed to the trustee when thereupon Curtis and Collins would have the trustee vest the title to the lands in the corporation and receive the full amount involved, $315,600, in stock of the corporation in payment therefor.

Provision was made that Holbrook should be an

original incorporator and a director as long as he owned any stock. Holbrook's payments were provided as follows:

> "That when the 42,380 acres shall have been deeded to the said trustee, or the title to said acreage secured to said second parties by acquiring forest reserve or through any other method or source, Curtis and Collins will pay to Holbrook the balance of the purchase price (that is to say, over and above the $200,000 to be advanced to purchase the scrip), the sum of $115,600, as follows: They shall deliver to him properly indorsed and fully paid up and free from assessments and all other liens, 789 shares of stock, from $5,000 to $10,000 in cash and the balance in notes of Curtis and Collins payable six months from date, with interest, in full payment of said balance." [102—69]

Holbrook was thereupon to give to Curtis and Collins a notice to the trustee that he had been fully paid. It was provided that if Curtis and Collins advanced for the purchase of said lands an amount in excess of $200,000, the principal sum of the promissory notes was to be reduced in an amount equal to such excess. If not all of the $200,000 was necessary to purchase the 42,380 acres the balance was to be paid to Holbrook. It was also provided in the contract that if Holbrook could not secure title to the whole of said 42,380 acres of land by forest reserve, he might secure such titles through any other legal means or source, but in no

event should he or the persons deeding the same be paid for the lands thus acquired until the title thereto was certified to be good by Shurtleff and deeded to the trustee, and when so certified the bank should pay for the land. Provision was also made for the formation of a railroad corporation if found practicable, and Holbrook was to have the right to subscribe for and purchase the same proportion of stock of the railroad and be a director therein. This latter corporation has never been accomplished.

As far as this scrip land is concerned, it is seen that the corporation was to acquire title to the land through Curtis and Collins, and Holbrook to get his stock as well as his money profits and the money to finance his purchase of forest reserve base from Curtis and Collins. The title of the land acquired by the corporation did not actually pass through Curtis and Collins, being held by a trustee, who was likewise a trustee for Mr. Holbrook. In effect it was a transaction of purchase and sale between Holbrook as vendor, and Curtis and Collins as vendee, but with the formation of the corporation Holbrook was required to take a part of his profit in the stock which represented the land conveyed to the corporation. In this transaction the parties have been seen to be dealing at arm's-length.

Holbrook thereupon set about, with the assistance of his son Charles H. Holbrook, Jr., to acquire the necessary scrip. He met [103—70] considerable difficulty. After getting together a few thousand acres in varied lots, his son testifies that his father

was ready to abandon the enterprise, when a large block of scrip was offered by the Southern Pacific Railroad Company. This was bought and the amount of 42,380 acres called for by the contract secured by appropriate action in the Land Office. In addition some thousands of acres beyond that amount were secured by the use of scrip. This transpired in the late winter or early spring of 1902. The scrip was obtained at various prices, from about $3.00 to $5.50 an acre, so that after paying Mr. Charles E. Swazy, a Land Office attorney, $2,500 as commission and for services, Mr. Holbrook's transaction showed a handsome profit to him. Tuman was interested as an equal partner with Holbrook, but was not known as such by the other parties, and did not secure his share of the profits of this and subsequent enterprises from Holbrook until some years afterwards, after suit filed. It must be perfectly apparent that as regards all these lands acquired by the use of forest reserve scrip, the relationship between Curtis and Collins and the defendant company, their assignee on the one hand, and Holbrook and Tuman on the other, was in no sense that of partners or of principal and agent. It is perfectly clear that Curtis and Collins and the company on the one hand, and Holbrook and Tuman on the other, the latter undisclosed, dealt at arm's-length as adversary parties in any transaction of purchase and sale. This fact is of importance as regards the cases at bar in the light it may throw upon the relations of the parties as regards these timber and stone entries.

About this time, the spring or early summer of 1902, Holbrook broached to T. D. Collins, his son E. S. Collins, and to D. G. Curtis, the question of acquiring desired timber lands by purchasing timber and stone entries. To the elder Collins he stated that scrip was getting hard to obtain, that entries were being made on lands they desired by settlers, but that the settlers' titles were the best titles they could obtain (Tr. 2009). Collins [104—71] stated that they would be willing to take those lands if the titles were absolutely good. About the same conversation was had with E. S. Collins and the younger Curtis. E. S. Collins discussed with him various means of acquiring lands otherwise than by scrip, state lieu, school lands and the like (Tr. 2083), and E. S. Collins assented to the acquiring of the timber and stone entries if everything about the entry was "fair, above board and legal" (Tr. 2082). The details were not discussed and undoubtedly Collins and Curtis not only desired that the title should be acquired in a legal manner but had every confidence in Holbrook that they would be so acquired. There was no further agreeement made except at a later date undefined Holbrook stated that he could not afford to turn in the lands at $7.50 an acre and asked $10.00 an acre, which was assented to.

There is much conflicting evidence as to whether the reason advanced by Holbrook that scrip was hard to obtain was true. To me this seems of little importance. I think, however, it is a fact shown by the evidence that there was a greater demand for forest reserve scrip at this time, the price had risen, and that

probably there was difficulty in obtaining scrip without restrictions available to use, and to obtain it promptly so that the lands cruised and listed as desirable for purchase could be obtained promptly before they were taken up by others. I think undoubtedly, therefore, that Holbrook was to some degree influenced by the reason he gave to the Curtises and Collinses. But it seems to me clear that he must also have been influenced by the fact that the acquirement of timber and stone entries would assure him a desirable profit. The cost of acquiring a timber and stone entry of 160 acres, including a fee of $25, to the locator who furnished the description and pointed out the land, and a profit of $100 to the entryman on the sale, amounted to approximately $592 (Tr. 696), or $3.70 an acre. This was about $2.00 less than the price of scrip at that time. There [105—72] was thus the strongest inducement for Holbrook to prefer this class of entries. He had been told prior to that by Mr. Swezy, a Land Office attorney, that it had been decided by some United States court "that a person could go into a community broadcast and advertise that he would buy stone and timber claims and could loan money to the entrymen (Tr. 3033)." Tuman and undoubtedly Holbrook knew at that time that agreements for purchase or sale with the entrymen before entry were illegal and furthermore believed that such agreements would be illegal at any time before final proof (Tr. 2818). This was before the Williamson decision and was the universal view of the Land Office and of the public. I have no question that the

plan of operations devised by Holbrook and Tuman to acquire these lands by timber and stone entries was intended by them to conform to the law. This plan is best disclosed by the evidence of what happened.

The first requisite of course would be money with which to acquire the entries. There is no evidence at all that the Curtises or Collinses or the Curtis, Collins & Holbrook Company after its organization, supplied Holbrook and Tuman or either of them or anyone else money to acquire timber and stone entries, as was done by them in the case of the scrip. The money used was that which represented Holbrook's and Tuman's profit on the scrip sales. As Tuman testifies (Tr. 719) there was at all times available for this purpose a fund of at least $30,000 in cash. It will be remembered that under the contract of December 19, 1901, Holbrook was paid his profit partly in stock, a small amount in cash, and the balance in the notes of Curtis and Collins. These notes on the 42,000 acre transaction would amount to $26,700, which could have been discounted at once. Undoubtedly also Holbrook could have made a loan on the contract itself or on the stock of the corporation after that was organized on August 15, 1902, and its stock issued against the scrip lands which they began to acquire in September, 1902 (Tr. 3145). All this money was handled by Holbrook and kept in his name, partly [106—73] in the Bank of California and partly in the Bank of Lassen County. Tuman had the right to draw on this latter account and did so.

It will readily be conceived that Tuman's cruising operatinons in Plumas County and the scripping of a large tract of land would become extensively known in such a mountain community (Tr. 2654). While he kept his earlier activities quiet to prevent others entering the land by scripping, he made no effort to do so when the operation of scripping had been accomplished (Tr. ——). After that, as he said "publicity was what I was after" (Tr. 923). It was his design to encourage entries under the Timber and Stone Act and to facilitate them in every way by making known his readiness to loan money to entrymen and to create the impression that the lands could be sold after final proof at a profit of not less than $100 to the entryman, avoiding all the time any agreement of purchase. This was not difficult and probably was not only by reason of Tuman's extensive cruising and his scripping operations but several other large timber operators, for example, T. B. Walker, Scott, Engle and others had been purchasing largely of Government lands. There existed a very well defined rumor (Tr. 2837) that timber and stone entries prior to this could be sold for $750 a claim. Tuman's proposed price was therefore an advance. What Tuman did was to stay in the background himself until the time of final proof or after, as did Holbrook throughout the transaction, and conduct his operations through others commonly termed locators. Apparently the earliest of these locators was one Alexander Cameron. How many entries he was concerned with does not appear. But he was the locator in the case of a few of the en-

tries here concerned. Cameron is dead. A. E. Head apparently was another in a few cases. A majority of the entries concerned in this consolidated cause were made with the assistance of John H. Heppe, John E. Remick or John W. Aid. Heppe was the first of these. Heppe [107—74] had himself made an entry, probably through Head (an entry not here involved) and after that, at whose initiative does not clearly appear, entered upon the business of locating entrymen. The arrangement was that Tuman should furnish Heppe descriptions of available and desirable timber land for those desiring to locate. Tuman told him that money would be furnished to prove up if needed, and gave him to understand that the entryman could thereafter sell his land, if he desired, at a profit of $100 over all expenses, and that Heppe would receive $25 for each such entry if Tuman purchased it. Undoubtedly Heppe was advised that no agreement should be made. Heppe thereupon became active in encouraging locations. His testimony is as to most of the entrymen, that they came to him; and while this would undoubtedly be true, in many cases it is unlikely that Heppe was other than active in the matter. The details in various entries differ, but generally speaking Heppe told those whom he approached that they could make $100 over expenses by using their "timber right" and that the expenses, if necessary, would be supplied. Generally nothing more was said. Aid was a laborer or teamster around Chico who brought a number of entrymen from that vicinity. His method was similar to Heppe's.

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Remick operated from Taylorville. The operations of Heppe had become well known, as had the possibility of borrowing needed funds, and the amount of profit on a sale of the land. Remick seeing the possibility of making some money in the way of location fees, came to Tuman in the spring of 1902 and told him of certain bodies of timber land in Township 25 North, Range 10 East, and in Township 25 North, Range 12 East. He had previously spoken of this timber to one Cook, a timber operator. Tuman was the first to respond and was told by Remick that he had a lot of friends who would like to locate, that he understood Heppe had been making a location fee of $25, and that he would like to locate his friends. Tuman examined the land and sent Remick descriptions by mail (Tr. 2907). In this letter Tuman told Remick that he would [108—75] loan people money and would send Remick money to be loaned, but to be careful not to make any contracts and to keep account of all moneys expended (Tr. 3002). He said nothing to Remick about the $100 net profit, but Remick understood that from the operations that were carried on by Heppe (Tr. 2986–3002). Remick apparently was much more discreet than Heppe. He had no conversation with any of the locators to whom he gave descriptions of lands to the effect that their lands could be sold or that they would make at least $100 profit, excepting John Huntington and Edward Cooksey. These were the first two that he had anything to do with and as he says, he mentioned the $100 possible profit to them because "it was necessary to start something and I

explained it to them. Subsequently I did not have to say anything to anyone particularly" (Tr. 2921). As Remick testifies, he asked Cooksey and Huntington if they wanted to take up a piece of land, that they could do so and make $100. "They wanted to know how and I told them by selling it. They said they did not have any money to take it and I said they could borrow the money. I never told them I would purchase it but I assured them they could sell it" (Tr. 2967). After that it appears that entrymen came to him and asked for descriptions and he did not find it necessary to do more than furnish the descriptions, all of them apparently relying upon general rumor as to what could be accomplished if the land were sold.

Throughout these operations the expenses of the travelling on the part of the entrymen were paid where it seemed necessary by Heppe or Remick or Aid out of money placed in their hands by Tuman. The final proof money in cases where it was supplied by Tuman (a majority of the entries here concerned) was ready at the Land Office on the day of final proof. It was handed to the entrymen sometimes by Remick, in a few cases by his brother or by Arthur Elam, a compass-man in Tuman's employ. In many cases this money was handed to the entrymen secretly in a room apart; in most of the cases probably a note was taken, though not always. Sometimes the note ran in favor of Elam, and [109—76] very often in favor of S. C. Lewis whose name was used for the purpose, he being a friend of Holbrook and of Tuman.

After final proof, sometimes immediately, sometimes in the course of a few weeks, and at other times even later, the entries were purchased by Tuman. In at least two instances, that of McManus and W. D. Lawrence, Tuman did not get the lands nor the money which he loaned for final proof. McManus sold to Walker and did not pay back his loan. Lawrence did not make final proof but kept the money, except for a part which he subsequently returned. All deeds were taken in the name of Charles E. Gregory as grantee. The circumstances of sale differ in different cases. Tuman's plan, he says, was to acquire the entries at a profit of $100 to the entryman, in which event the money was paid over on the execution of the deed and the note, if any, returned. Sometimes this transaction went through at this price without any bargaining and other cases it was a matter of negotiation, and in some cases he had to pay prices in excess of $100 profit to the entryman, as high as $1600 gross. At the latter price of course he made no profit.

Subsequently, at varying dates deeds were executed by Gregory in favor of the Curtis, Collins & Holbrook Company. Gregory was a real estate man of San Francisco, a friend of Charles H. Holbrook, Jr. He had been asked by the latter if titles to certain timber lands could be placed in his name as an accommodation, and he assented. He had nothing otherwise to do with the operations and knew nothing about the lands.

In view of the contention of the Government that the conveyance of all of these entries to Gregory and

the withholding of them from record are evidences of fraud, I pause now to comment on the purpose of this conveyance. A comparison with the scheme of conveyancing as regards the scrip lands at once suggests itself. The use of a third person in whom the titles were assembled was probably suggested by the similar practice of conveyancing employed as regards the lands obtained by the use [110—77] of forest lieu scrip. The difference between these and the timber and stone lands was that in the scrip lands Curtis and Collins advanced the money to purchase them owing Holbrook after purchase of the base lands the profit due to him under the contract. In the timber and stone entries Holbrook purchased the entries with his own funds. In the scrip lands the trustee was necessary to take the title for the protection of Curtis and Collins in the moneys advanced for the purchase of the base, and for the protection of Holbrook to hold the title to the selected lands until he was paid his profit. He was a trustee for both parties, and when the profit was finally paid the trustee conveyed the lands at the direction of Curtis and Collins to the Curtis, Collins and Holbrook Company. Gregory upon taking title would in no sense be a trustee for Curtis and Collins. He held only for Holbrook (including always Tuman where Holbrook is thus mentioned). Curtis and Collins knew nothing about him until afterwards. He would only hold for them in the event they paid Holbrook for this land prior to the time they received title. This, however, has not been shown and the natural presumption is that Holbrook was paid for

these timber and stone lands at the time when Gregory conveyed to the company. At least twenty of such deeds were made in December, 1902, forty-eight in May, 1903, and the balance at various times thereafter.

It was of course natural since the lands were passing into one ownership that they should be assembled in one name. The query at once arises, why they were not taken in the name of Holbrook or in that of Tuman, the real owners? Tuman suggests in his testimony that it was to prevent Curtis and Collins from learning what the real profit of Holbrook and Tuman was. This, however, is probably only his supposition and at any rate obviously is not a valid reason. Charles H. Holbrook, Jr., states that it was because his father was well known in this country as a dealer in timber lands and that if deeds were taken in his name the entrymen who had not sold would be more likely to arise [111—78] their price (Tr. 3038). This of course is a possible explanation. The Government, on the contrary, contends that it was part of a general plan evident throughout the transaction whereby Holbrook and Tuman were "concealing their trail" and endeavoring to keep the facts from the Land Office. Against this, of course, it may be at once suggested that the putting of these titles in any single name, whether Holbrook's or Gregory's would convey the same information. This suggestion it is difficult to answer. I am not able to give this fact of the assembling of the lands in Gregory any especial significance as regards the question of fraud in these entries.

Holbrook's action as regards the recording of these deeds to Gregory, however, is a different matter. All the facts in this regard will be discussed and assembled in the form of tables in connection with the discussion of the defense of innocent purchaser. It may, however, here be noted that except for six cases where deeds ran directly from the entryman to the Curtis & Holbrook Company, ~~and one other case, that of J. L. Gray, who deeded to Gregory,~~ the deeds from the entrymen were withheld from record until after patent had issued. Only two explanations suggest themselves as governing Holbrook's action in this regard:

1. That it was useless to incur the expense of recordation of deeds until the title was secured by the final action of the Department of the Interior in issuing patent, the chance of losing title under an unrecorded conveyance being doubtless assumed to be a slight one.

2. As must be claimed by the Government, that the withholding of the entrymen's deeds from record would impede any investigation of the Land Office prior to patent. I cannot give much weight to the first reason suggested as a possible one. The amount involved in recording fees would not have been more than a few hundred dollars. The second reason seems to me the one which in reason we must adopt as more likely. Holbrook may have [112—79] been confident, as Tuman says he was that their plan of operation was one that was within the law as it had been construed, but the fact remains that they were engrossing public lands by a scheme of en-

couraged entries and they might well have feared a disclosure of the fact prior to patent.

Little more need be said as to the facts common to all entries. The Curtis, Collins & Holbrook Company was formed, as I stated, on August 15, 1902 (Tr.——). The first board of directors was composed of T. D. Collins, his son E. S. Collins, J. G. Curtis, his son D. G. Curtis, Charles H. Holbrook, Charles H. Holbrook, Jr., and Irving F. Moulton. Mr. Moulton, an officer of the bank of California, was simply an accommodation director to fill the board. The elder Collins was the first President of the company and always remained such. The elder Holbrook was vice-president and general manager. D. G. Curtis was secretary and treasurer. The transfer of lands involved in these suits was actively concluded between D. G. Curtis representing Curtis and Collins, the purchasers and Mr. Holbrook in his own behalf and that of Tuman, the latter being undisclosed. The money paid for these timber and stone lands I must find was paid by Curtis and Collins and not by the company. This is in analogy to the contract requirements as to scrip lands, which, as has been seen (*supra*, p. 70) contemplated the securing of lands by other means if necessary than that of using scrip. The evidence shows also that the Curtis, Collins and Holbrook Company carried an account with the Bank of California beginning September 17, 1902 (Tr. 3290). The authorized signatures at that time were C. H. Holbrook, vice-president and D. G. Curtis, secretary, both required. A transcript of that account was

produced and not introduced by the Government. The contention of the United States Attorney was that Holbrook was paid by the company. I must assume, therefore, that the account showed only what other witnesses testified was the fact (Tr. 3072), namely, that except where the company bought direct, its expenditures were only for trifling matters and not involving the purchase of these timber and [113—80] stone entries. Both the Government and the defendants suffered by reason of the fire of April, 1906. The account-books, the stock journal and ledger and the minute-books of the Curtis, Collins & Holbrook Company, and also the stock certificate book were destroyed, as were also many of the records of the Bank of California at that time. Mr. Holbrook, Jr., who acted as assistant secretary, keeping the account-books of the company and its minutes, stated (Tr. 3038) that the purchase of these timber and stone lands by the company was in accordance with resolutions of the board of directors entered on the minutes. These resolutions recited the proposal by T. D. Collins and J. G. Curtis in writing to sell the lands in question to the company in return for stock issued to them at par and the acceptance of these proposals by the company (Tr. 3037–3038). As in the case of the scrip lands, therefore, Curtis and Collins would pay Holbrook direct for the lands through the Bank of California, make their proposition to the company, receive their stock, and the land would thereupon be conveyed by Gregory to the company without passing through Curtis and Collins. The transaction was undoubt-

edly simultaneous, and as part of his payment Holbrook would receive the shares of stock of the company to which he was entitled and which were issued by the company to Curtis and Collins. Each of the sons of the three families concerned having received allotments of stock from their fathers, the two Curtises sold their stock to T. D. Collins, a part in the spring or summer of 1905 and the balance in or about February, 1906, at prices ranging from $150 to $200 a share, and resigned their directorships. Holbrook and his son sold their stock at about the same prices and the same times and likewise retired as officers of the company in February, 1906. C. A. Shurtleff, the company's attorney then became secretary and has continued as such. Other directors, all representatives of Mr. Collins, at various times constituted the board. Mr. Tuman made a settlement with Holbrook after suit filed in 1905 and got 200 shares of stock, and [114—81] became a director after the Holbrooks and Curtises sold out. He himself sold his stock to D. T. Collins in March, 1912, for $750 a share.

Charles H. Holbrook, Sr., died on February 22d, 1909.

From this recital the plan by which Tuman and Holbrook gathered together in Gregory's name a large acreage of timber land is sufficiently evident. It was first to advertise generally the existence of a market for timber and stone entries in Plumas County either by direct suggestion through agents or by the advertisement of neighborhood gossip; second, by the same means to indicate individuals as sources

of information as to available timber land which otherwise no entryman not a cruiser would be possessed of; third, to lend encouragement to intending entrymen by advertisement in the same two ways that money could be borrowed to facilitate the entry; fourth, to make known again by the same two methods of suggestion by the locating agents and neighborhood gossips, that the profit that could be expected would be not less than $100. Considering what we have learned of the state of the law under the decisions, it is apparent that this plan could be followed without impairing the legality of the entries by prior agreements as to conveyance. Indeed, it would have been foolishly fatal to have made agreements. Tuman was alive to this possibility. He not only refused to make agreements in several cases where entrymen desired it (Tr. 2835–2836) but he instructed the men who helped him induce the locations, like Heppe and Remick, likewise to avoid making any promises or agreements (Tr. 2803–2804). As a matter of law, however, if any agreements were made by any of these men I am of the opinion that it was within the general scope of their powers and that Tuman would be chargeable as their principal.

I have said it would have been foolish for Tuman to have made agreements. The field was prepared for the operation of his scheme. From 1895 timber and stone entries had been made [115—82] in this vicinity (Tr. 2903) and large tracts had been gathered together by T. B. Walker, Engle and others. Most of the entrymen were impecunious and to all of them $100, with the hope that more might be had,

was a considerable inducement; to such persons also the offer of financial aid in purchasing the land from the Government was a welcome and necessary assistance. Such an entryman hearing of what was being done either directly or indirectly might enter a timber claim with the intention of selling it, with the knowledge that it could be sold for not less than $100 and that he would be out nothing of his own funds, if he had them, and yet never come in contact with Tuman or with any of his representatives except in getting a description and being shown the land, and furthermore without having in any way curtailed his freedom to dispose of the land as he might choose. Tuman obviously did not loan this money for the purpose of getting any interest upon it or as a matter of philanthropy. His advertisement of a source from which money could be obtained, which was never, of course, definitely indicated, was to induce the taking up of the land. What he did after entry is really not particularly material in view of the Williamson decision. His purpose in loaning the money was to effectuate the entry and incidentally perhaps place the entryman under some sense of moral obligation to him. As he says, his money was fairly secure, since the entryman would have the land and would either have to sell to him at the profit Tuman offered of $100, or stand suit with the land in the background as security for the recovery of the loan. The chance Tuman was taking when loaning money was therefore not great. At the same time there were several cases where he never got the land nor the money but doubtless did not think it

worth while for the amount involved to sue for its recovery. Furthermore, there were a number of cases where the entrymen realizing that they were practically free to barter, did so, and forced Tuman to come to their terms. All of these [116—83] facts must be kept constantly in mind in determining whether or not there was an agreement prior to entry. Another thing to be kept in mind is that the issue is to determine not whether what Tuman did was fraudulent but whether what each entryman did was fraudulent in that he had bound himself by an agreement. If an agreement to sell subsequent to entry is shown expressly or by implication it is immaterial unless it is plain evidence of an agreement prior to entry.

I have said enough, I think, to indicate my opinion that under a proper interpretation of the timber and stone act a majority and probably all of the entries here concerned were in violation of that act in that they took up the land intending to sell it and not use it for themselves. But on that interpretation there was no fraud against the Government since if that fact had been known the Government would nevertheless have issued the patent, so that no deceit was made manifest. Under the doctrine of the Bailey case, under proper pleadings, I think it likely that many of these entries would be regarded as speculative. The point before us for examination, however, is, I repeat, whether the Government has shown that the entryman made an agreement to convey his land prior to entering it, either expressly or by necessary implication. Under

the law also, an agreement is implied where it is evident that the entryman was a mere dummy acting without personal volition, consideration or initiative but entirely at the direction of another under such circumstances that the profit he made can be regarded as nothing but the wages of a hired employee. With that in mind we must examine the various details of each specific entry.

COMMENT ON RULINGS AND ON WITNESSES.

Before taking up an examination of the facts of the Cooksey entry or of any of the others some observations may be made of a general character as to the witnesses and as to certain leading rulings.

The greatest latitude was allowed the Government in the [117—84] presentation of circumstantial evidence of fraud. Over the objection of the defendants what happened after the entry and even the final proof papers were admitted in evidence for whatever they might show as to the entryman's intention and acts prior to entry. In view of the Williamson decision I am extremely doubtful whether the final proof papers were admissible for any purpose. But the rulings are harmless since the statements there could necessarily be of little value to prove what happened prior to entry. All of the entrymen that appeared as witnesses were called by the Government. All had been previously interviewed by special agents and throughout the trial the Government's counsel endeavored to have their written statements to these special agents received in evidence. If these statements were such as to refresh the witness' recollec-

tion I allowed the witness to testify independently of the statement after being thus refreshed. In any case where the witness, though not refreshed, was willing to guarantee the correctness of the statement, I allowed it as a memorial of past recollection. But if this were not so it was allowed, if proved, only for the purpose of impeachment; that is, to show that the witness was not to be credited, but was not allowed as independent evidence of the facts contained. This of course should not be the case for it was open to all the objections to hearsay evidence. In any event of course its dangers were manifest, since the statements were in all cases written by the special agents during the interview and liable to be influenced as to the phrasing of the statements by the partisan nature of the inquiry. See generally Code of Civil Procedure, secs. 2047, 2049, 2051, 2052; Wigmore on Evidence, ————.

In a number of cases it will be found that the Government's counsel, though repeatedly warned against leading his witness, obtained evidence deemed important to the Government by means of leading questions. In any such case where the witness did not appear to me hostile or reluctant, and where the entire [118—85] substance of the desired evidence was contained in the question phrased in a manner favorable to the Government's contention, I have given no weight to such evidence unless otherwise satisfied as to the truth of the matters contained (compare Knowles, J., in United States vs. Clark, 125 Fed. 777, *supra*).

The testimony of only one witness of importance,

the entryman Self, was presented by deposition. All the other witnesses gave testimony before me in open court. I not only took the usual opportunities of observation of the witnesses with a view to determining the truth of their testimony, but made notes during the trial of impressions made upon me, which I have consulted in each case as I have reread their evidence. As regards the entrymen in general, their testimony was given freely and fairly and without reluctance. I have borne in mind that it was natural for them to put the best phase possible upon a transaction that was under suspicion. The weakness in the testimony of the entrymen and indeed of most of the witnesses arose from the fact that it was given eleven years after the events under examination. Tuman was a witness for the Government and was recalled by the defendants. In the main he testified freely and fairly. He hesitated at places and used terms of expression favorable to himself; for example, he endeavored always to make it appear that Heppe and the other locators were being paid by the entrymen in the final purchase of their claim when as a matter of exact fact they were paid by Tuman at the time he settled with the entrymen. Such things, however, are minor and I consider Tuman's testimony truthful. As regards Heppe and Remick I believe likewise that both were endeavoring to tell the exact truth. I have to take account as regards each of these witnesses of a natural bias. Heppe was formerly employed by the Curtis, Collins and Holbrook Company as a sort of forest ranger to take care of their lands and protect them from fire. He

was discharged from this position; he then later requested them for some thousands of dollars to enable him to get out of [119—86] the country, which was refused. His bias would naturally be against the defendants and I think such bias existed, of which I have taken account. His memory was a little too ready as to events and conversations which transpired with so many different people eleven years before. If the case rested on his testimony alone I should feel doubtful, but I have given Heppe's testimony weight where it was corroborated by that of other witnesses. Remick was not only concerned as was Heppe in these operations but later took his place as forest ranger or care-taker, a position he still occupies. I have considered this natural bias in weighing his testimony. However, I see no reason to doubt its truth. As to the testimony of the two Curtises, of the two Collinses, of Mr. Shurtleff and of other witnesses called for the defendants, they are all men of the highest character and undoubtedly truthful.

I pass now to an examination of the specific facts as regards the entry of Edward L. Cooksey.

SPECIFIC FACTS OF ENTRY OF EDWARD L. COOKSEY.

The defendant, Edward L. Cooksey, appeared as a witness for the Government. In 1902 he resided at Taylorville, Plumas County, California, was a carpenter by trade, and was engaged in running a near-by shingle-mill. J. E. Remick suggested his locating the land, showed him the land and through L. C. Remick, his brother, loaned him some money to make

final proof. This money belonged to Tuman. Cooksey testifies substantially as follows (Tr. 1125 et seq.):

"Remick suggested my taking up the land, and asked me if I wanted to take up a timber claim. I told him I didn't know. He told me where it was situated, and that if I wanted to take up a timber claim it would be a good chance to locate, and if I wanted to sell the timber land I would be able to sell it, that he could find a purchaser. I can't remember whether he said how much profit there would be in it. It was rumored around over the country how much profit there would be in these timber [120—87] claims. It seems to me Remick told me if I wanted to sell the timber claim I could make as much as $100 over and above expenses. I don't remember him saying anything about paying expenses. Anyway, I told him that I did not want to take up a timber claim on such a proposition, and that anybody else should pay all my expenses, that I might be going wrong. He told me if I wanted money to take up a timber claim I could borrow it. To the best of my knowledge I spoke with Remick twice, two times close together. At first I had not made up my mind. At the time of proving up I did not have ready money. I gave my note in favor of a man named Lewis and put a mortgage on some mining claims. L. C. Remick handed me the money and I used it to pay for the land. After final proof I sold to J. E. Remick, and in the first place de-

manded my note that was marked paid and got sufficient money as I understand it to amount to $100 over and above my expenditures."

Remick is even more definite in his account of this conversation. This man Cooksey and John Huntington were the only two to whom he went and suggested a location and mentioned that they could make $100 profit. He did this because he had descriptions and wanted people generally to know that he was locating entrymen. He says (Tr. 2967):

"I think I asked Cooksey and Huntington if they wanted to take up a piece of land. I told them that they could by taking up a piece of land make $100. They wanted to know how, and I told them by selling it. They said they did not have any money to take it up and I told them they could borrow the money. That is as near as I remember it. I never told them I would purchase it, but I assured them they could sell it. My conversation and only interest in the matter was making the $25 for each locator."

Cooksey paid out of his own funds all the ordinary Land Office fees and apparently the money necessary for publication of his notice in the paper. He used the money borrowed on his note and mortgage to pay the purchase price of the land. He paid all his own travelling expenses in the first place. After entry Cooksey found out that there were others in the market [121—88] for timber

lands besides Remick, but not in the vicinity of the land he had taken up. He made no particular effort to find out whether anyone would buy the timber claim besides Remick, and when Remick came to him for a deed there was no particular bargaining. This testimony occurred (Tr. 1131); on direct examination:

"Q. As you stated it, you stated that you were not willing to accept Mr. Remick's proposition, that is what you told Mr. Remick?

"A. The proposition—which proposition was it?

"Q. That is, to take up the land and get your expense money and deed the land for $100?

"A. I told him if I could borrow the money I would locate the land on those terms."

On cross-examination (Tr. 1133):

"Q. In the second conversation you told him, as you have testified, that you said that you would take up the land on those terms. * * *

"A. I would take up the timber land on the terms, provided that I could borrow the money to take up the timber land.

"Q. That was the terms?

"A. That is the idea.

"Q. I just wanted to get at the idea, Mr. Cooksey; at either one of those conversations did you have any talk with Mr. Remick relative to the persons to whom you would sell the land when you took it up?

"A. No; I did not know who I was to sell the timber land to.

"Q. Did you have any conversation with him touching the sale of the land after you got it to him or to anyone that he might sell it to?

"A. He said he could find me a purchaser.

"Q. Did you agree at that time to sell to that purchaser?

"A. I did not make any—no, there was no binding agreement that I could understand at that time.

"Q. Was there any agreement between you as to whom you should sell?

"A. He said he was certain he could find a purchaser, that is as far as it went; I took his word for it.

"Q. And based upon that statement of Mr. Remicks in regard to selling it, taken in connection with the further statement if you could not have disposed of it you would not have taken it up—

"A. (Intg.) I would not have taken it up unless I thought I could have made something out of my timber claim."

Cooksey's entry was made on August 2, 1902, and in his sworn statement he followed the Government form taken from the statute, that "I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or con-

tract or in any way or manner, [122—89] with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself."

It is probable that in making this sworn statement after the negotiations had with Remick, Cooksey was influenced by the same idea as to what a contract or agreement was, as when on the stand he said "there was no binding agreement." He meant that it was not made in writing or orally in explicit terms. I think, however, there can be no doubt that an agreement to convey is readily to be implied from the testimony above given. Any uncertainty existing in Cooksey's testimony as to the amount for which sales should be made and as to the way in which the profits was to be obtained were supplied by Mr. Remick's testimony. The purchaser was not defined but understood by both sides to be someone whom Remick was representing. Without Remick's assurances both as to the supplying of Land Office expenses and that a purchaser could be found at a profit of $100, Cooksey would not have taken up the entry.

It is not a case where, paraphrasing Judge Bean, in United States vs. Barber Lumber Company, *supra,* pp. 38–9, one person desiring to acquire timber land made known his willingness to buy the land, and an entryman knowing of that fact made entry with the expectation of selling to such intending purchaser, because here, paraphrasing Judge Bean again, there has been something fur-

ther in the way of communication or contract or agreement between the parties. There was not merely here the general announcement, but the entrymen and the representative of the purchaser met and discussed terms and reached an agreement.

I find in this case that the sworn statement was false and that in fact Cooksey prior to his entry had made an agreement with Remick whereby the title to be acquired was to be conveyed to Remick's benefit.

Final proof was made and the Receiver's duplicate receipt [123—90] issued on October 16th, 1902. On October 25, 1902, by deed executed and acknowledged Cooksey conveyed the land to Charles E. Gregory, and this deed was recorded at the request of C. H. Holbrook, Jr., on September 10, 1904. Patent issued on June 8th, 1904. The deed from Gregory to the Curtis, Collins and Holbrook Company was executed, acknowledged and delivered on May 2, 1903, and was recorded at the request of the Curtis, Collins & Holbrook Company on October 18, 1909.

FACTS AND FINDINGS APPLICABLE TO ALL ENTRIES IN CONSOLIDATED CAUSE AS TO DEFENSE OF PURCHASE FOR VALUE WITHOUT NOTICE.

In all these cases the Curtis, Collins & Holbrook Company, the holder of the legal title to the lands involved, has interposed the defense that it purchased the lands in good faith for a valuable consideration and without notice of any fraud. It is

easily conceivable that the court may differ with the Master and the Court of Appeals may differ with the Judge of the trial court as to whether or not fraud has been proved. The defense here considered is therefore a crucial point in the case.

It is entirely clear that the defendant company obtained its titles for a valuable consideration passing contemporaneously with the deeds of conveyance; that is, the company issued its stock at par for the lands to Curtis and Collins, and Curtis and Collins paid Holbrook, for whom Gregory was holding the title, at the rate of $10 per acre for part of the lands and $7.50 for an unascertained balance, part of which was cash and part of which was the stock which they had received from the company. There remains for consideration, therefore, the question of its *bona fides* and of its knowledge or notice of alleged fraud at the time it took the titles.

The question arises at the outset upon whom rests the [124—91] burden of proof. This defense is an affirmative defense and at first thought it would seem that for that reason proof of the elements of the defense must be borne by the defendant asserting it. The authorities seem to be conflicting. In 39 Cyc. 1869, it is stated, in effect, that where the defense is in response to an averment of the bill the burden is on the plaintiff, but otherwise on the defendant. In 23 American & English Encyclopedia of Law, 2d Edition, pages 522 and 523, it is suggested that in behalf of the purchaser there appears a presumption of innocence by reason of his

taking the title by deed, making it necessary for the complaining party to charge his conscience by pleading and proving knowledge or notice. So far as the latter element of knowledge or notice is concerned, the question appears settled by the opinion in the Supreme Court in United States vs. Clark, quoted below, to the effect that the burden is upon the Government to prove notice or facts from which notice may be presumed. There arises here no particular need to discuss this question or any of its refinements with any particularity, since under the facts it is entirely clear that neither the corporation nor any of its officers, if we except Holbrook and Tuman, had any knowledge actual or constructive of the frauds alleged. The only question will be whether the knowledge of Holbrook, if any, when during his vice-presidency the corporation took title, must be presumed to be that of the corporation. On this question it is possible that the rule stated by the Supreme Court as to the burden of proof of notice may become material. So far as Tuman is concerned, he did not become a director until 1906, long after title to these lands passed to the company.

Before discussing the facts which lead me to conclude that none of the officers had any knowledge, actual or constructive, of the Government's alleged equity, it will be well to take our bearings in some of the decided cases. After that I will discuss separately the law as to imputed knowledge by [125—92] reason of Holbrook's position as vice-president.

In United States vs. Detroit Timber & Lumber Co., 131 Fed. 668, the Circuit Court of Appeals of the Eighth Circuit, speaking by Judge Sanborn, said (for the facts, see *supra,* 19):

> "The Detroit company was dealing with the Martin company at arm's-length; it was the vendee; the Martin company was the vendor. The latter exhibited its contracts and deeds and declared that the titles under them were perfect, and that every grantor under whom it held had a patent or final receipt for his land. Clark, the President of the Detroit company, who conducted the negotiations and made the purchase, examined and checked the contracts and deeds, believed the statements of the officers of the vendor, and completed the purchase. The evidence is clear, positive and without dispute, that neither the Detroit company nor its officers ever had any knowledge or suspicion that any of the lands here in controversy were irregularly or fraudulently entered until the latter part of September, 1901, more than four months after the purchase had been completed and after all the patents had issued."

The Court further pointed out that there was nothing to incite a reasonably prudent man to inquire for fraud, nor would a reasonably diligent inquiry have discovered fraud, since the entrymen would have answered that the statements in the applications were true, for they had so testified. Inquiry of the officers of the Land Department would have elicited that there was no falsehood for

the reason that they had issued final receipts and patents. The Court goes further and says:

> "Nor was there any duty upon this purchaser, in the absence of other facts suggesting inquiry, when the seller presented conveyances to it apparently valid and gave it assurance that they vested perfect title in it, to make further investigation. The presumption always is in the absence of countervailing evidence, that men tell the truth and that bills of sale and deeds *prima facie* valid are actually so, and purchasers may lawfully act upon this presumption. Jones vs. Simpson, 116 U. S. 609."

In the same case in the Supreme Court, 200 U. S. 321, Judge Brewer said:

> "We do not understand the law to be as stated, or that one who enters into an ordinary and reasonable contract for the purchase of property from another is bound to presume that the vendor is a wrongdoer and that, therefore, he must make a searching inquiry as to the validity of his claim to the property. * * * No one is bound to assume that the party with whom he deals is a wrongdoer, and if he presents property, the title to which is apparently valid, and there are no circumstances disclosed which [126—93] cast suspicion upon the title, he may rightfully deal with him and, paying full value for the same, acquire the rights of a purchaser in good faith. Jones vs. Simpson, 116 U. S. 609. He is not bound to make a searching examination of all

the account books of the vendor nor to hunt for something to cast a suspicion upon the integrity of the title."

In United States vs. Clark, in the trial court, 125 Fed. 774, Judge Knowles said that even if Clark was bound to take notice of the different steps taken by the entrymen in obtaining the patents, he would only be required to take notice of the records of the Land Office which were in due form.

"I do not think he could be required to be more astute than the Land Officers themselves."

But, the Court said, if he had gone further and made inquiry of the entrymen and had been told the same facts as were in the papers and special examinations before the Land Office, he could have learned nothing that the Government did not learn.

"But it cannot be conceded that there is any evidence that shows that Clark was put upon his inquiry as to the sources of his title. There is absolutely no proof showing or tending to show that Clark had any actual knowledge of the frauds alleged to have been committed by the entrymen and women. The evidence shows conclusively that Cobban was not the agent of Clark in the purchase of these lands. Cobban was the vendor."

In the Court of Appeals of this circuit in the same case, 138 Fed. 294, the same view was taken. Judge Ross pointed out how strange it would be if Clark had been willing to become a party with Cobban and the others named in the alleged fraud, or

if Cobban had been acting as Clark's agent, that Clark should have paid Cobban $217,000, when Cobban had only paid at the rate of $2.50 an acre for the land, together with $100 to each of the entrymen and incidental Land Office fees and expenses. Judge Ross referred to the fact that Clark's cruiser had estimated the land while the entries were in progress and that he had loaned Cobban money with which to carry on his operations of acquiring additional land, and said:

> 'While it is true that the record shows that the appellee knew that some of the money he loaned to Cobban was intended to be used by him in acquiring additional lands, it [127—94] does not show that the appellee knew, or had any reason to know, that he expected to acquire them fraudulently or in any way unlawfully. United States patents cannot be annulled upon mere suspicion of fraud, even if it could be properly held that any such suspicion arises in this record against the appellee. * * * We think that the evidence in the present record falls far short of establishing that the appellee knew, or had reason to know, of any such fraud at the time of his respective purchases."

Judge Gilbert, dissenting, considered that facts came to the knowledge of Clark and his agent sufficient to put them upon inquiry. The deeds showed that Cobban was carrying out a large and comprehensive scheme to obtain the lands; 17 deeds being executed on one day, 29 on another, 22 on another,

and final receipts having been issued but a short time before the deeds, some only two days previously; that these facts indicated a concert of action of which Cobban was the engineer. Judge Gilbert emphasized also the inspection of the lands by defendant's agent contemporaneously with the entries and the large sums loaned by defendants to Cobban.

The Clark case came before the Supreme Court in 200 U. S. 601, the opinion being written by Justice Holmes. He said:

> "But the position is that Clark is privy to the original frauds and that, even if he is not, inasmuch as he did not purchase on the faith of the patent, he has no better title than the entrymen would have had if the title had remained in them. * * * We may assume for the purposes of decision, as did the Circuit Court of Appeals, that the original frauds are made out, although there is great amount of testimony to good faith. But the point of law just stated has been disposed of by United States vs. Detroit Timber & L. Co., *supra*. The United States is attempting to upset a legal title. In order to do that it must charge Clark with notice of the original frauds. The fact that Clark, while he had a merely equitable or personal claim against the Government, held it subject to any defects it might have, whether he knew it or not, as generally is the case with regard to assigned contracts not negotiable, was not equivalent to actual notice of the defects. (It is recognized in the (Timber &

Stone) Act that there may be a *bona fide* purchaser before a patent issues.) The title when conveyed related back to the date of the original entries. Therefore actual notice must be proved. * * * The requirements that proof should be clear in such case has been repeated in a series of decisions, from the Maxwell Land Grant case (citation) to United States vs. Stinson (citation). There is nothing sufficient to show that Clark had actual notice of the arrangement by which Cobban got the lands. The allegation that Cobban was Clark's agent in the purchase wholly [128—95] breaks down. Clark was at a distance. He dealt as a purchaser with Cobban, and paid him the market price and a substantial price even on the Government's calculations. So far as any inference was to be drawn from the nearness of the respective dates of the Receiver's receipts, the deeds of the entrymen to Cobban, and the deeds of Cobban to Clark, it was as open to the officers of the Government as to Clark, if, indeed, he knew anything about those dates; yet they seem to have suspected nothing, and he was advised by reputable counsel that the titles were good, and bought only on his advice. With regard to constructive notice, in addition to the facts just mentioned, the Government relies on an argument that Cobban began negotiations with Clark before he had acquired title to the lands, not, however, identifying those lands. Assuming this to be true, it requires

Clark to have kept that fact in mind when the conveyances were made to him, and noticing the dates of the conveyances to Cobban and of the Receiver's receipts to infer that the negotiations were begun upon a scheme to get the lands from the Government by fraud. It requires an actual and not necessary inference from knowledge with which Clark may have been chargeable, but which he probably, or at least, possibly, did not actually possess."

Justice Holmes then referred to the fact that Clark's cruiser had gone on the land and stated that even if it was to be assumed that the cruiser's knowledge was chargeable to Clark—

"still the knowledge is a mere guess. There was nothing present or required to be present on the face of the earth to indicate when the entry took place. We cannot infer fraud from merely more or less familiar relations between some of Clark's agents and Cobban. When suspicion is suggested it is easily entertained. But bearing in mind, as was said in United States vs. Detroit T. & L. Co., that Clark was not bound to hunt for grounds of doubt, and referring to the canons of proof laid down by the decisions, and to the findings of the courts below, we are of opinion that the decree dismissing the bill must be affirmed."

The facts of the cases at bar are on all-fours with the cases just quoted from. The Government has claimed that Curtis and Collins were principals and that Holbrook was their agent to acquire these

lands. The claim utterly breaks down under the evidence. Curtis and Collins on the one hand and Holbrook on the other are plainly seen to have been dealing at arm's length in an adversary relation as vendee and vendor respectively. The case is not as strong as the Clark case. Curtis and Collins made no loans of money to acquire these timber and stone lands as did Clark. The money was Holbrook's own, the profit of his previous dealings with the scrip lands. They [129—96] did not have any cruiser or other representative on the ground who might be cognizant of details, as in the Clark case. Curtis and Collins made one or two trips generally throughout the timber country, but knowing the country in general and relying from past dealings on Holbrook's word, they accepted his estimates of the amount of timber without question. All the directors and officers of the Curtis, Collins & Holbrook Company since the beginning, with the exception of Holbrook, and he is dead, have appeared as witnesses in these cases and denied any knowledge or any suspicion of irregularity in the entries. They all appeared to be men of honor and business integrity. J. G. Curtis and T. D. Collins are men over 70 years of age. Curtis knew nothing of the details of these timber entries, no longer owns any stock and is therefore without interest in the controversy, nor is it even contended by the Government that his testimony is not true. T. D. Collins, who owns all the stock of the corporation except a minor portion belonging to his son, and the necessary qualification shares for directors,

is a man of strong religious principles and testified in advance of the regular order in which he would have been called because it then appeared that illness might end his life before the defense would be reached. Under these circumstances his testimony of innocence gains additional credence. D. G. Curtis, as Secretary, checked over the acreage with Holbrook on the passing of the deeds but made no investigation of the manner in which title had been acquired. Both T. D. Collins and E. S. Collins testified that when Holbrook stated that scrip was hard to obtain and that to acquire more land it would have to be obtained from settlers, that their rights were the best rights obtainable (Trans. 2009) they assented on condition that the title should be "first class." Their relations with Holbrook had been so satisfactoy as regards their dealings on scrip lands that they had every reason to trust him implicitly. Holbrook assured them, even guaranteed them, that the titles were [130—97] perfectly regular and valid. Under these circumstances, in accordance with the cases above quoted from, the purchasers had no reason to look further for grounds of doubt. Mr. C. A. Shurtleff, who was attorney for both parties during the transactions, and Secretary beginning in 1904, is a lawyer of the best standing at this bar. All of these parties, including all officers of the company as stated from the beginning testified that they knew of no charges of fraud until after or about the time of the filing of these suits in 1910.

No examination of the title to the entries was

made until 1905 when Collins bought out the Curtis and the Holbrook stock. At that time Mr. Shurtleff as his attorney examined the paper record of the cases and naturally found everything regular. This record consists of the Register's receipts, the deeds to Gregory, and the deeds from Gregory. Mr. Shurtleff did not have the Land Office records (Tr. 3243). If he had examined them then or at any previous time they obviously would have disclosed no irregularity. They would have passed his inspection just as they passed the inspection of the Land Office officials.

E. S. Collins, at the time Holbrook proposed taking over timber and stone entries, was somewhat familiar through a residence in the State of Washington with the fact that frequent irregularities in such entries took place but obtained Holbrook's assurance that everything in regard to the entry was "straight and proper" and was satisfied with that (Tr. 2083 *et seq.*) No details were discussed.

The evidence of such men cannot be lightly disregarded. But let us go farther than the cases warrant and assume an obligation upon those in charge of this matter to examine further. If they had been able to hunt out and find the original entrymen, it is not likely that the entrymen would have testified differently from their testimony in the Land Office if they had been willing to talk at all. In a table annexed to this Report to be subsequently referred to, I will set forth in the form of a schedule the dates of final proof and the dates [131—98] of the deeds of the entrymen which would show

the nearness of these transactions to each other and to the dates of the respective final proofs. But this in the opinion of the Supreme Court would not impute notice.

The only bit of evidence upon which the Government could hang a suspicion that T. D. Collins suspected fraud in these entries was the fact that since these suits were begun Collins bought 200 shares of the company's stock from George Tuman at $750.00 a share, which, as Collins says, was twice what it was worth (Tr. 2036.) Even this, however, is obviously no evidence that he knew of any irregularities in the entries when they were acquired by the company. It would only show an intent, if it showed anything, to influence Tuman's testimony in this cause. The answer to this suspicion is found in the fact that Collins believed Tuman was going to sell his stock to a third person with whom Collins, from past experience, desired to have no association, a reason which Mr. Collins at first declined to give and offered only on the direct suggestion of the Master that it was desirable for him to do so (Tr. 2036). In the second place, Tuman's testimony, if thus intended to be influenced, was not colored with any desire to assist the defendants. He impressed me as truthful and except in certain unimportant details entirely frank and ready.

It thus conclusively appears that except from conclusions that may follow from the facts that Holbrook was at the time that these titles were acquired Vice-president and Manager of the Curtis, Collins & Holbrook Company, neither J. G. Cur-

tis nor T. D. Collins nor the company itself nor any of its officers at any time had any actual knowledge or notice or any constructive notice arising from the facts that would put them on inquiry as to the fraud which the Government claims constitutes its equity. There remains to be considered the effect of Holbrook's position as vice-president of the company. [132—99]

The Government contends that Holbrook was an active participant in the frauds alleged to have been committed by the entrymen, or in the alternative that he constructively had notice of these frauds committed by his agents Remick, Heppe and others, in making agreements with the entrymen as to the title and that the notice thus imparted to him, the vice-president and managing officer of the defendant company, was notice to that company on the principle that "notice to an agent while acting within the scope of his authority and in reference to a matter over which his authority extends is notice to the principal." Mechem on Agency, sec. 718. From the table which will be annexed to this report it will be seen that about thirty-one of the entries were made prior to the date of the incorporation of the company; the balance afterwards. As to notice this makes no difference on principle, but it will be claimed that as to the latter entries the case is stronger for the reason that Holbrook is claimed to have actively participated in the fraud while vice-president and managing officer of the defendant corporation.

Let us examine the premises upon which this con-

tention rests. The evidence fails to show that Holbrook actively participated in the fraud upon the Government, that is, the making of the agreement prior to entry. This was carried out by Tuman's agents, Remick, Heppe and the others. (I am of course assuming for the purpose of the discussion that the fraud has been established.) In the absence of actual knowledge, therefore, we have a question presented of notice on the principles of agency. Holbrook, during all these transactions did none of the actual work in the field. He attended to the financial end of his dealings with Tuman and to the office work in San Francisco. It is true that Tuman testifies that Holbrook knew everything that he knew. (Tr. 889). When we consider, however, that the determination of whether a prior agreement was made turns upon each particular case, and is often decided on very narrow lines depending on what was said and done between the entryman and the locating agent, [133—100] it is not only difficult to believe that Holbrook knew all these details but almost as difficult to believe that Tuman himself knew them. It must be remembered that their plan and so far as they knew its actual carrying out was to avoid anything like an agreement. It therefore comes to this: that Tuman is charged with notice of whatever fraudulent agreement Remick or Heppe may have made with an entryman by a presumption in the law of agency; that Holbrook likewise is charged with notice by reason of a presumption arising out of the relation of partnership between him and Tuman

and that the corporation is charged with notice by reason of a presumption arising out of Holbrook's tenure of the office of vice-president of its board. It does not strike one as just that the defendant corporation should lose the property which it has purchased by reason of this pyramiding of legal fiction.

It is, however, entirely clear under the law that the defendant corporation here was not chargeable with notice. To the general rule upon which the Government here relies there is a well-settled exception. The reason of the principal rule which charges the principal with notice is that it is the duty of the agent to disclose to his principal all notice or knowledge which he may possess and which is necessary for the principal's protection or guidance. This duty the law presumes the agent to have performed and imputes to the principal whatever notice or knowledge the agent possesses, whether he has in fact disclosed it or not. The Distilled Spirits, 11 Wall. 367, Mechem on Agency, sec. 719. The exception arises where the agent is in an adversary relation or otherwise so related to the subject-matter that this relation or the agent's previous conduct renders it reasonable to believe that he will not disclose the information he possesses. In the present case for example, when the company took the conveyance from Gregory, though Holbrook was its vice-president at the time, he was at the same time in an adversary [134—101] relation, he himself being the seller of the property. It is idle to say that he would have disclosed any

knowledge of fraud in the titles which he is presumed to possess (contrary to the actual fact). Holbrook was not buying this land for the company. He was buying it from others and selling it to the company at a considerable profit above its cost to him, which profit he retained and was expected to retain. It cannot be assumed that he told or would tell the company of any defect in its title, and lacking such assumption in reason the law does not raise any presumption of notice. It will be remembered also that Holbrook had assured both of the Collinses that these timber and stone titles would be first-class titles. The exception noted is well established by a number of cases.

In Frenkel vs. Hudson, 82 Ala. 158, 2 So. 758, the question was identical with that at bar, whether a corporation had notice of an unrecorded agreement to execute a purchase money mortgage of real estate which it had acquired from its president by reason of the president's knowledge of this agreement. The Court, speaking by Judge Summerville, a very able Judge, said:

> "It nowhere appears that the board of directors, or corporate managers of the company, had knowledge of any facts sufficient to put them on inquiry as to the existence of this equity. The only way in which it is sought to bring home notice to the company is through its President, Goelet, who had actual knowledge of the alleged agreement, and it is insisted that the knowledge of the agent must be imputed to the principal. The general rule

is that notice of a fact acquired by an agent, while transacting business of his principal, operates constructively as notice to the principal. This rule applies of course as well to corporations as to natural persons. It is based upon the principle that it is the duty of the agent to act for his principal upon such notice, or to communicate the information obtained by him to his principal, so as to enable the latter to act on it. It has no application however to a case where the agent acts for himself, in his own interest and adversely to that of the principal. His adversary character and antagonistic interests take him out of the operation of the general rule, for two reasons: first, that he will very likely in such case act for himself rather than for his principal, and secondly, he will not be likely to communicate to the principal a fact which he is interested in concealing. It would be both unjust and unreasonable to impute notice by mere construction under such circumstances, and such is the established rule of law on this subject. * * * The testimony satisfies us that Goelet bought the land from the Citizens' Mutual Insurance Company for himself at one price, and [135—102] sold it at another to the Point Clear Improvement Company, in payment of a debt due for stock subscriptions. The contention that he bought for the defendant company is not sustained by the record. In making the sale therefore through Adams, he was acting

for himself, in his own interest and in an adversary character. It is not to be supposed that he communicated his knowledge of the alleged equity to his vendee, by informing its board of directors, or other managing officers of the existence of such a prejudicial fact. His own knowledge as President of the company was insufficient to charge the company in its corporate capacity with notice."

See, also, Wickersham & Keith vs. Chicago Zinc Co., 18 Kan. 481; Innerarity vs. Merchants National Bank, 139 Mass., 1 N. E. 282; Mechem on Agency, 718, 719, 721, 723, 729, 730. The rule is the same in the federal courts. In American National Bank vs. Miller decided by the Supreme Court in June, 1913, Justice Lamar said:

"Such notice, however, is sought to be imputed to the Macon Bank because Plant was its president, and it is argued that what he knew the bank must be considered as knowing.

"This presents another phase of the oft-recurring question as to when and how far notice to an agent is notice to his principal. In view of the many decisions on the subject, it is unnecessary to more than to apply them to the facts of this case. If Plant, within the scope of his office, had knowledge of a fact which it was his duty to declare, and not to his interest to conceal, then his knowledge is to be treated as that of the bank. For he is then presumed to have done what he ought

to have done, and to have actually given the information to his principal.

"But if the fact of his own insolvency and of his personal indebtedness to the Nashville Bank were matters which it was to his interest to conceal, the law does not by a fiction charge the Macon Bank, of which he was President, with notice of facts which the agent not only did not disclose, but which he was interested in concealing."

J. J. McCaskill Company vs. United States, 216 U. S. 504, was a case in which the defense of innocent purchaser was not allowed. After citing the general rule and the exception above stated, with the authorities, Justice McKenna, speaking for the court:

"Undoubtedly, a corporation is, in law, a person or entity entirely distinct from its stockholders and officers. It may have interests distinct from theirs. Their interests, it may be conceived, may be adverse to its interests, and hence has arisen against the presumption that their knowledge is its knowledge, the counter presumption that, in transactions with it, when their interest is adverse, their knowledge will not be attributed to it. But while this presumption should be enforced to protect the corporation, it should not be carried so far as to enable the corporation to become a means of fraud or a means to evade its responsibilities. A growing tendency [136—103] is therefore exhibited in the court to

look beyond the corporate form to the purpose of it, and to the officers who are identified with that purpose. Illustrations are given of this in Cook on Corporations, sections 663, 664 and 727. The principle was enforced in this court in Simmons Creek Coal Co. vs. Doran, 142 U. S. 417. In that case a corporation claimed title to land through a deed of its corporators, one of whom became its president. Of the effect of this the Court said: 'Associated together to carry forward a common enterprise, the knowledge or actual notice of all these corporators and the president was the knowledge or notice of the company; and, if constructive notice bound them, it bound the company.'

"The case at bar is within the principle. The bill alleges that J. J. McCaskill and Robert E. L. McCaskill were copartners and engaged in the manufacture of lumber at Freeport, Florida. They incorporated this business, it is alleged, under the laws of Florida, 'by the corporate name of J. J. McCaskill Company, with the said J. J. McCaskill as president and the said Robert E. L. McCaskill as secretary, owning a large majority of the stock of said corporation, with the entire management and control of the business and affairs of said corporation.' There is no denial of this allegation. The interests of the corporators and the corporation thus shown to be identical, not adverse, we think the ruling in Simmons Creek Coal Co. vs. Doran is applicable."

In other words, wherever all the incorporators or promoters of a corporation have knowledge and then form themselves into a corporation, even apparently, where there is a small minority interest, the Courts will not allow the fiction of corporate entity to conceal a state of knowledge which was common to the promoters. If here not only Holbrook but Curtis and Collins had been charged with notice, there is no question but what the company would be held to be so charged. There would in fact be no adversary relation and the association would be the same as before except for its corporate form. See, also, on the general proposition Whittle vs. Vanderbilt M. & M. Co. (Wellborn, Judge), 83 Fed. 48; In re Senoia Duck Mills, 193 Fed. 711; High vs. Opalite Tile Co., 184 Fed. 450; Lilly vs. Hamilton Bank of New York, 178 Fed. 550.

For another reason allied in principle to the last it would seem that the corporation defendant is not charged with notice. These transactions upon which fraud must be predicated in these cases took place between Heppe, Remick and other locating agents of Holbrook and Tuman and the entrymen. If any relation existed between these locators and the company, that is, such as would charge that company with notice, it would be [137—104] that of subagents. On this question it is said in Mechem on Agency, sec. 728:

> "I the subagent be one whom the agent was expressly or impliedly authorized to appoint he is to be deemed to be the agent of the principal, and knowledge to such subagent would

be notice to the principal as in the case of other agents. But if the subagent be the agent of the agent merely, then there is no privity between him and the principal, and his knowledge cannot be imputed to the principal."

Citing Hoover vs. Wise, 91 U. S. 308, and other cases.

Assuming that the transactions here in question occurred between the Curtis, Collins & Holbrook Company and Holbrook, it has been seen that their relations were that of vendee and vendor, respectively. Remick and the others therefore could in no sense be considered subagents of the company; they were agents of Holbrook and Tuman only. The notice therefore which they had by reason of their dealings with Holbrook may be imputed to Holbrook but could not be imputed to the company.

In what has gone before I have assumed that the transaction was indicated by the way in which the deeds ran, that is to say, that Holbrook sold to the Curtis, Collins & Holbrook Company. As a matter of fact, as has been seen before, it is not an exact statement. The entrymen conveyed the title to Gregory who held as trustee for Holbrook. Holbrook meanwhile was under contract to sell these lands to T. D. Collins and J. G. Curtis at $7.50 and $10.00 an acre, part cash and part stock of the corporation. Curtis and Collins at no time paid cash into the corporation for their stock, but made a proposition to transfer land for stock which was accepted. Undoubtedy the settlement as between Holbrook and Curtis and Collins and between Curtis, and

Collins and the Curtis, Collins & Holbrook Company was simultaneous. Though Gregory after the entrymen's deeds held the legal title, the entire equitable title rested in Holbrook, his beneficiary, and when Holbrook fulfilled his contract with Curtis and Collins this equitable title passed to Curtis and Collins, Gregory becoming their trustee for a [138—105] point of time, and at their direction, in pursuance of their proposal to the company, Gregory conveyed the legal title to the company. All of this is more or less theoretical, of course, but I point it out for this reason; if Curtis and Collins had paid Holbrook part cash and part from the stock which they already had by reason of the scrip transactions, they might have taken a deed of the legal title directly from Gregory and later conveyed that legal title by another deed to the Curtis, Collins & Holbrook Company. Now, it is perfectly clear that Curtis and Collins had neither actual nor constructive notice of any possible fraud in these cases. They would therefore have held clear and free from any equity on the part of the Government. It is decided by a long list of authorities, though there is some conflict, that a purchaser with notice from a purchaser without notice takes free and clear of equities, on the theory that otherwise the free alienation of the innocent purchaser's property would be imperiled.

But had this been done, on this principle the Curtis, Collins & Holbrook Company, even under the vice-presidency of Holbrook, taking it from two innocent purchasers, would have held free and clear

of the Government claim. Does it seem right that because they took a short cut in conveyancing an opposite result should follow? Equity regards the substance and not the form. It seems, therefore, clear that on this ground the defendant company must be held to have taken the title to these lands free of equities.

For all of the above reasons, therefore, I find that the Curtis, Collins & Holbrook Company acquired the land of E. L. Cooksey, described in the bill against him, and all the other lands in this consolidated cause, unless specially excepted in the reports in other cases, by purchase in good faith for a valuable consideration and without notice, constructive or actual, of any equity in behalf of the United States. [139—106]

FACTS AND FINDINGS ON THE DEFENSE OF THE STATUTE OF LIMITATIONS.

In forty-one of the cases in this consolidation, including the case against Edward L. Cooksey, the defendant Curtis, Collins & Holbrook Company by answer pleaded the statute of limitations.

The Act of Congress providing a limitation in suits to annul patents is as follows:

> "That suits by the United States to vacate and annul any patents heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. (Citation.)"

The theory of the complainant is that the suit is commenced on the date of the filing of the bill; the theory of the defense is that the rule is settled to the contrary in this circuit by United States vs. American Lumber Company and other cases, discussed hereafter.

Later in the litigation, in fact while the hearings were in progress before the Master, the theory of the Government changed and it was sought to avoid the effect of the statute on the groun1 that it was tolled by affirmative acts of fraud in the nature of concealment of deeds under the doctrine of the decision of the Circuit Court of Appeals of this circuit in United States vs. Linn & Lane Timber Company, and of the Eighth Circuit in United States vs. Exploration Company, hereafter discussed. In pursuance of this theory the Government, in accordance with leave granted by the Court, filed amendments to its bill of complaint on April 5, 1913, by adding a paragraph 9½ to the original bill, which amendment in the present case against Edward L. Cooksey is in the following language:

> "That by reason of the facts hereinbefore stated a fraud has been perpetrated on the complainant and it has been deprived of the legal title to the lands hereinbefore described, contrary to law and good conscience. That complainant had no knowledge of the facts as hereinbefore set out and did not discover such facts until a long time after the issuance of the patent to said defendant Edward L. Cooksey herein. That the facts constituting said fraud

as hereinbefore set forth did not become known to complainant until the 23d day of May, 1910, when the report of Don S. Rathbun, special agent of the General Land Office of the Department of the Interior of the United States, was filed with the Commissioner of the General Land Office of the United States, which said report was based upon a general investigation of charges of a great [140—107] number of violations of the public land laws in the northern part of the State of California; that said general investigation commenced in December, 1907, but was not completed as to the entry herein involved until immediately prior to the making of said report to the Commissioner of the General Land Office, nor were the facts hereinbefore alleged as to the fraud in making said entry and acquiring said land discovered by said special agent until immediately prior to the completion of said investigation and the report thereon to the Commissioner of the General Land Office May 23, 1910. That the failure on the part of the United States to discover said facts constituting said fraud prior to the 23d day of May, 1910, was without any fault or want of diligence or care on the part of complainant; that said fraud and the acts constituting the same were concealed from said complainant by affirmative acts on the part of defendants herein done for the purpose of concealing said fraud from said complainant and of preventing said complainant from discov-

ering said fraud, in this, that said land was conveyed by said entryman to said Charles E. Gregory by a deed executed and delivered to agents of the defendant, Curtis, Collins and Holbrook Company, for said Gregory on the 25th day of October, 1902, and which said deed was not filed for record in the office of the County Recorder of Plumas County, in which said land was situated, until the 10th day of September, 1904; that said land was conveyed by said Charles E. Gregory to said Curtis, Collins and Holbrook Company in a deed executed and delivered on the second day of May, 1903, and that said deed was not filed for record in the office of the County Recorder of Plumas County, until the 18th day of October, 1909. That said land was conveyed to said Charles E. Gregory upon a secret, fraudulent trust to hold the same for the benefit and accommodation of said defendant, Curtis, Collins and Holbrook Company, and that said Charles E. Gregory had no interest in said lands and did not know that he ever owned the same; that he paid no consideration for said lands, nor did he at any time receive any consideration for executing said deeds to Curtis, Collins and Holbrook Company, but did the same at the request of said company; that said deeds from said entryman to said Charles E. Gregory and from said Charles E. Gregory to the Curtis, Collins and Holbrook Company at all times since the execution of said deeds have been and now are in

the actual control and in the physical possession of the agents of the defendant the Curtis, Collins and Holbrook Company, and that while said deed from said entryman was actually made to said Charles E. Gregory named as grantee, said deed was never delivered to the said Charles E. Gregory personally, but his name was inserted in said deed for the purpose of concealing the actual ownership of said land and the fact that the title to the same had fraudulently been acquired from your complainant."

Briefly, the effect of this amendment is that the facts constituting fraud were not known to the Government until March 26, 1910, without fault or want of diligence on complainant's part, and that it was concealed from complainant by affirmative acts on the part of the defendants done for the purpose of concealing the fraud, in this, that conveyances of the land prior to patent were not recorded until after patent, [141—108] that is, respectively, in September, 1904, and October, 1909.

Both defendant Cooksey and defendant Curtis, Collins and Holbrook Company filed answers. Cooksey's answer puts in issue the material averments of the amendment and need not be further set forth. The answer of the company in addition to denials of the material equities of the complainant's amended bill, denies that the withholding of the deeds was done with the intent of defrauding the complainant, alleges that Gregory held the land for Charles H. Holbrook to be conveyed by Greg-

ory to such persons as Holbrook might direct, and that Holbrook in requesting Gregory to hold the land did not act as the company's agent, that later the land was conveyed to the company upon the request and at the direction of the said Holbrook pursuant to a contract entered into by the said Holbrook to convey the said property to T. D. Collins and J. G. Curtis or such person or corporation as they might request or direct. The answer alleges that the deed from the entryman to Gregory was never in the possession of the defendant or any agent of the defendant until the deed by Gregory to the defendant was delivered to it.

I will first consider when a suit in equity is brought, and secondly the questions arising under the amended bill. [142—109]

The first point mentioned was settled by this Court in United States vs. American Lumber Co., 80 Fed. 309, per Morrow, J.; affirmed on appeal in 85 Fed. 827, per Gilbert, J. See, also, United States vs. Miller, 164 Fed. 444, per Wolverton, J.

From these cases we deduce the rule that a suit in equity in the Federal Courts is begun when the bill is filed, the subpoena or substituted process issued and placed in the hands of the proper marshal for service. But there is a further requirement. If thereafter that officer uses reasonable diligence to make personal or substituted service, the commencement of the suit would relate back to the time process reached the marshal's hands; otherwise not.

Accordingly, unless a different rule is applicable

by reason of the averments and proofs under the amendments to the bills of complaint, the pleas of the statute of limitations herein must be sustained in the present case against Cooksey, and in the 33 others numbered as follows: that is to say, Nos. 15,077 to 15,081, inclusive; 15,091 to 15,119, inclusive. In all of these the 6-year period expired on June 8, 1910, and while bills were filed one day before the expiration of that period, i. e., on June 7, 1910, the subpoenas were not issued or received by the marshal until June 9, 1910, one day after the expiration of the period of limitation. In this view the action of the marshal or his deputy in reference to service, and the fact that the service was not made until July 22d following, is immaterial.

In cases Nos. 15,135 and 15,138 the period of limitations expired on June 27, 1910; and the bills were filed and the subpoenas issued on that day. They were not, however, received by the Marshal until June 29th, two days later. In these cases, for the same reason, the suits would not be commenced until the last-named date, and the plea of the statute of limitations would therefore be sustained.

In case Nos. 15,163, 15,173, 15,177 and 15,179 the period of limitations expired on July 26, 1910, and the bills of [143—110] complaint were filed and subpoenas issued on July 25, 1910, one day before the expiration of the period. They were not, however, received by the marshal until August 2, 1910, and for the reasons above given, unless a different rule is established, under the averments of the

amended bill, the defense in bar is good.

In the case of Mamie Ogle, No. 15,136, the period of limitation expired on June 27, 1910. The bill was filed, and the subpoena issued and received by the marshal on the same day. The subpoena was not, however, delivered to the deputy marshal for service, until July 1, 1910, or served by him on the defendant, Curtis, Collins & Holbrook Company, until July 22d following. The defendant was required to appear on the 1st day of August, 1910. This is, therefore, the only case in which the question of the reasonable diligence of the marshal can become material. Nothing, I think, would turn on the fact that the marshal did not deliver the process into the hands of his deputy for service until four days later; that is, on July 1st. The suit was begun when it reached the hands of the marshal, and the question is whether he exercised diligence in not serving the defendant company until July 22d. Without rehearsing the facts, my considered judgment is that reasonable diligence must be held to have been shown in serving the subpoena upon the defendant corporation, and that the defense of the statute of limitations in case No. 15,136 would not be available, under the original pleadings.

As heretofore stated, what has thus far been said applies to the defense of the statute in the event that a different rule is not applied by reason of the averments of the amended bill and the proofs thereunder.

I now come to a consideration of the cases in

which an exception has been allowed to the strict application of the words of the statute of March 3, 1891. Before doing so, however, I quote the following from the American Lumber Company cases, [144—111] the present point not being directly involved, as illustrative of the attitude of the courts toward this statute:

Judge Morrow said in the lower court, 80 Fed. 320:

> "There is no question in the present case but that counsel for complainant was acting *bona fide*. But this feature of the case cannot operate to extend the statute of limitations. As was aptly said by Chief Justice Marshal, in McIver vs. Ragan, 2 Wheat. 25: 'Courts cannot insert in the statute of limitations an exception which the statute does not contain.'"

Judge Gilbert said in 85 Fed., at p. 832:

> "It is argued that the Court should construe liberally, in favor of the United States, a self-imposed statute of limitations, and the case of U. S. vs. American Bell Tel. Co., 159 U. S. 548, 16 Sup. Ct. 69, is cited. The doctrine of that case, and of the precedents on which it is sustained, is confined in its application to cases in which uncertainty exists as to the intention of the legislature to impose the limitation. In the present case no doubt is suggested by the language of the statute, and there is no room for construction. It is clear that congress has said that all suits by the United States to vacate patents shall be brought within the period

limited by the act. The only question we are called upon to decide is whether this suit has been begun within that period. In determining at what point in the proceedings a suit shall be deemed to be commenced, we have no warrant for holding that the rule applicable to a suit on behalf of the United States shall differ from that applicable to other cases. When the United States, through its congress, has said that suits in its favor shall be brought only within a stated period, we have no criterion for determining whether a given suit was commenced within that period, except to apply the rules and principles applicable to all suitors. The decree of the Circuit Court will be affirmed."

In United States vs. Smith, 181 Fed. 546, the Linn & Lane case in the lower court, an unusual condition presented itself. In case No. 3320 the land was conveyed within a few days after final proof to one Willd in trust for defendant Smith, that is in April or May, 1900; in November, 1900, Willd conveyed it to Greacen; in February, 1901, Graecen conveyed to Rogers; in December, 1904, Rogers conveyed to Werner, all in trust for Smith, and all of these deeds were promptly recorded. In 3,319 final proof was submitted in August and October, 1900; about the same time the land was conveyed by the entrymen to defendant Kribs in trust for Smith; in October, 1904, Kribs [145—112] conveyed an undivided three-quarters to Smith, and in December of the same year conveyed the

other undivided one-quarter to Swenson in trust for Smith, and these deeds were also promptly filed of record. In May, 1906, the defendant Smith organized the Linn & Lane Timber Company for the purpose of taking and holding title to these and other lands. All the stock was issued to himself except one share to his wife and one to his attorney, and the corporation organized with Smith, his wife, his son and his daughter as its officers. In June, 1906, Smith executed to the corporation a deed of the lands in his name, and in May and August, 1907, Swenson and Werner at Smith's request conveyed the interests held by them. These deeds from Smith, Swenson and Werner to the corporation were retained by Smith, and not filed for record until the 9th of September, 1908, a little over three months after the bills of complaint in these suits were filed on May 25, 1908. The patents involved in case No. 3320 are dated August 12, 1902; eight of those in 3319 are dated July 9, 1902, and the remainder August 12th of the same year. The deeds to the corporation are thus seen to have appeared of record more than six years after the issuance of the patents, as well as several months after the filing of the suits. Upon the filing of the bills subpoenas *ad respondendum* were issued and placed in the hands of the marshal for service and were in due time served upon the resident defendants. Smith, Swenson and Werner were [146—113] nonresidents of the state. In July the marshal returned the subpoenas without service as to them. Thereupon, on July 27, 1908, a warning

order was issued on the application of the District Attorney, and the nonresidents were duly served. In September and October, Smith, Kribs, Werner and others filed pleas in abatement alleging that the property had been conveyed to and was owned by the Linn & Lane Timber Company prior to the commencement of the suits, and it was therefore an indispensable party. On November 16th the complainant filed amended bills making the Linn & Lane Timber Company a party, and subpoena was issued and placed in the hands of the marshal for service upon its resident agent, and service was subsequently had. To the amended bills among other defenses the statute of limitations was pleaded in the answer. Judge Bean, after deciding that the entries were fraudulent, *supra*, p. ——, said:

> "The next, and what I deem the most important and difficult, question in this case is the statute of limitations. (Quoting statute.)
>
> "These suits were not commenced against the Linn & Lane Timber Company until more than six years after the date of the issuance of the patents. As a general rule, the holder of the legal title is an indispensable party to a suit to set aside a patent (U. S. vs. Winnona & St. P. R., 67 Fed. 948; U. S. vs. C. P. R. R., 11 Fed. 449), and the statute of limitations does not cease to run in his favor until he is made a party to the suit and process issued and placed in the hands of the marshal with a *bona fide* intent that it shall be served. Miller

vs. McIntyre, 6 Pet. 61. But the identity of Smith and the Linn & Lane Timber Company and their relation to the title to the property in controversy is such that I do not think the rule should be applied in this case. Smith is the real party in interest and the beneficial owner of the property. The corporation was organized by him as a mere holding concern. He owned all of its capital stock. He and the members of his family composed its board of directors, and were the officers of the corporation. In fact, Smith was the corporation and the corporation was Smith. The question of the statute of limitations should be therefore determined by the time the suit was commenced against Smith and the holders of the record title, and not against the mere holding corporation. If, prior to the commencement of these suits, Smith had conveyed or caused the property to be conveyed to some natural person in trust for him, but had withheld the deeds from record and kept the matter secret until the six years had expired, it would hardly be contended that the action is barred, and no greater effect should be given to the organization of the corporation and the deeds to it. The suit was commenced against Smith when the warning order was issued to him and placed in the hands [147—114] of the proper officer for service. U. S. vs. Lumber Co., 80 Fed. 309, and 85 Fed. 827. At that time the statute had not run except as to the eight patents issued

July 9, 1902. As to them, the suit is barred, for in my judgment the statute begins to run from the date of the issuance of the patent, and not from the discovery of the fraud. The language of the statute is plain and leaves no room for construction. It says suits of the United States to vacate or annul patents shall only be brought within six years after the issuance of patent. As said by Mr. Justice Gilbert, in speaking for the Circuit Court of Appeals for the Ninth Circuit, in 85 Fed. *supra:* 'There is no room for construction. It is clear that Congress has said that all suits by the United States to vacate patents shall be brought within the period limited by the act.'

"The object of this statute is to extinguish any right the Government may have in the land and vest a perfect title in the adverse holder after six years from the date of the patent, regardless of any mistake or error in the Land Department, or the fraud or imposition of the patentee. U. S. vs. Winona & St. P. R. R., 165 U. S. 463; U. S. vs. Chandler-Dunbar Co., 209 U. S. 447."

This case came before the Circuit Court of Appeals for the Ninth Circuit under the title of Linn & Lane Timber Company vs. United States, and the decision of the Court, written by Judge Gilbert, is reported in 196 Fed. 593. Judge Gilbert after affirming the conclusions of the Judge below as to the existence of fraud said:

"That the legal title to all of the lands passed to the Linn & Lane Timber Company by virtue of the deeds executed to it is undisputed, and that that company was not made a party to the suits until more than six years after the issuance of the patents is also shown by the records. The important question in the cases, therefore, is whether the company's plea of the statute of limitations should be sustained."

The opinion points out that Smith knew of Government investigation of the entries at the time the corporation was organized in which he owned all of the capital stock as well as the land; that up to the time when the deeds were recorded, September 9, 1908, this corporation had done no business in Oregon, had not taken possession of the lands, and there was nothing of record in Oregon to indicate that the corporation possessed any property there or ever transacted any business in that state. It was pointed out that undoubtedly "one at least of the purposes for which it was formed was to conceal fraudulently therein the titles to the lands which are the subject of this suit, and to [148—115] keep the titles so concealed until the time when the statute of limitations should bar the anticipated suit of the Government to set aside the patents." After referring to 20 Cyc. 466, stating that "the fact that a deed is withheld from record or is otherwise concealed is a badge of fraud"; to McAlpine vs. Hedges, 21 Fed. 689, and to various authorities in the law of corporations, the Court held with Judge Bean that the plea of the statute

could not be invoked by a corporation, which was only another form for Smith himself. The decision turned on a well-known principle of the law of corporations.

But the Court also referred to Bailey vs. Glover, 21 Wall. 342, and said:

> "In that case the statute of limitations was as absolute as that which is invoked in the present case. It was section 5057 of the Revised Statutes, providing:
>
> " 'No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy, and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee.'
>
> "Glover, fraudulently intending to take advantage of the bankruptcy law, secretly conveyed property to members of his family. The assignee in bankruptcy, more than three years after his appointment, having ascertained the facts, brought a suit to set aside the conveyances. The Court held that the bar did not commence to run until the fraud was discovered. Mr. Justice Miller, for the Court, said:
>
> " 'We also think that in suits in equity the decided weight of authority is in favor of the proposition that, where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his

part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.'

"Speaking of the principles of the statutes of limitations, the learned Justice said:

" 'They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which should show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.'

"The doctrine of that case has been reaffirmed in numerous subsequent decisions. In Rosenthal vs. Walker, 111 U. S. [149—116] 185, 4 Sup. Ct. 382, 28 L. Ed. 395, the Court said:

" 'The case of Bailey vs. Glover has often been cited by the Court, but has never been doubted or qualified.'

"No distinction between the statute of limitations invoked in that case and that which is invoked in the present case is to be found in the fact that in the former the time is limited

from the date when the 'cause of action accrued.'

"In Gifford vs. Helms, 98 U. S. 248, 25 L. Ed. 57, construing that statute, the Court said that the cause of action accrued on the appointment of the assignee or trustee in bankruptcy.

"What was said by this Court in United States vs. American Lumber Company, 85 Fed. 827, 29 C. C. A. 431, was in answer to the contention that the statute of limitations should be liberally construed in favor of the Government so as to hold its effort to commence the action equivalent to a commencement thereof within the time limited by the statute. There was in the case no question of fraud or of a fraudulent concealment of a conveyance."

It may be here remarked that the statement contained in the last sentence is, in part, an error. If, as I conceive, this Court is entitled to look at its own files, it appears that in the American Lumber Company case the essence of the bill was the allegations of fraud in procuring lands to be taken up under the Timber and Stone Act, under prior agreements for sale to defendants. There was, however, no question apparent of the fraudulent concealment of a conveyance.

The decree of the lower Court in United States vs. Smith was accordingly affirmed. However, it was subsequently pressed upon the attention of the Court that what the Court said in the second ground of affirmance required a modification of the decree, and the reversing of the lower court as to the eight

patents wherein Judge Bean had sustained the bar of the statute of limitations. Accordingly, in a decision of the Court, reported in 203 Fed. 394, the decree was amended with instructions to enter decrees to the United States as to all the lands concerned in these suits. The Court said:

> "The additional ground which this Court found for sustaining the Court below was that the fraud complained of in the bills had been concealed by the defendants, and had not been discovered by the plaintiff until long after the date of the patents, and that the suits had been commenced within the period of six years after such discovery of fraud." [150—117]

After referring to the decision in the Eighth Circuit in United States vs. Exploration Co., Ltd., 203 Fed. 387, the Court said:

> "Upon a careful reconsideration of the authorities we are of the opinion that the fraud of the defendants, as alleged in the bills and shown by the facts, was sufficient to toll the statute of limitations as to all the lands involved in the suits. The fraud not only antedated the patents, but after patents were issued fraudulent conveyances were made, and concealed and kept from record, obviously for the purpose of covering up the prior fraudulent transactions."

In the United States vs. Exploration Co., Ltd., the lower Court (190 Fed. 405), sustained the bar of the statute on the authority of United States vs. Winona & St. P. R. R., 165 U. S. 463, United States vs. Chandler-Dunbar Co., 209 U. S. 447, and other

cases, including Judge Bean's decision in United States vs. Smith, and our Court of Appeals decision in the American Lumber Company case. The case came up on a demurrer to the bill. The Circuit Court of Appeals, 203 Fed. 387, reversed this decision, and directed the overruling of the demurrer.

The bill alleged a scheme by the defendant to obtain a large quantity of coal lands by dummy entries and the fraudulent acquisition of patents. Six of the patents in suit were dated October 16, 1902; three September 16, 1902. The fraud was discovered in 1909, and the bill filed March 3, 1911. It is apparent, therefore, that the statutory period had expired when the fraud was discovered.

The bill also charged as part of the conspiracy the fraudulent concealment of the fraud by affirmative acts of fraud. "These subsequent fraudulent acts included (a) the execution of conveyances by the 'dummy' entrymen, which conveyances were in fact executed at the time applications were made to enter the lands but the dates of which were left blank, and afterwards false dates inserted; (b) the execution of several mesne conveyances to secret trustees, through which the title was finally merged in the defendant Exploration Company; (c) the withholding from the records and from the knowledge of the United States of [151—118] these conveyances, which if known, would have disclosed the true facts in the premises." Since the questions involved arose on the demurrer to the bill these facts must be taken as admitted.

The Court stated the problem before it as follows:

"The question presented for decision is concisely stated in appellant's brief, as follows:

" 'If the United States is defrauded of public lands by means of "dummy" entries, and the perpetrators and beneficiaries of the fraud by the subsequent and affirmative acts of fraud conceal the original fraud from the knowledge of the Government *until after six years have elapsed* from the date of the issuance of the patents, will a court of equity permit the wrongdoers to enjoy the fruits of their fraud, by pleading the statute of limitations as a defense, when the delay in the institution of the suit was deliberately induced by fraud practiced upon the Government for the express purpose of gaining the benefits of the statute?'

"This is an equitable action in a court of equity, and the statute of limitations was passed with direct reference to this class of actions, so there can be no controversy over the binding force of the statute. It is not ambiguous, *and its construction is not difficult in ordinary actions of fraud to set aside patents for land.* The real question before us is whether the enactment of the statute repealed the equitable rule, enforced by courts of equity, that, when the object of the suit is to obtain relief against a fraud, the bar of the statute does not commence to run until the fraud is discovered or becomes known to the party injured by it." (Italics mine.)

The Court then discussed Bailey vs. Glover,

supra, Kirby vs. Lake Shore Railroad, 120 U. S. 130, the Linn & Lane case in 196 Fed., Sherwood vs. Sutton, Fed. cas. No. 12,782, and distinguished the cases relied on to the contrary.

Before applying these decisions to the problem before us it would be well to notice briefly two of these cases last referred to arising in the Supreme Court of the United States. In United States vs. Winona etc. R. R., 165 U. S. 463, 476, Justice Brewer sair, referring to the Act of 1891:

> "Under the benign influence of this statute it would matter not what the mistake or error of the land department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was public land of the United States and open to sale and conveyance through the land department. The act of 1896 extended the time for the bringing of suits for patents theretofore issued for five years from the passage of that act. It is true that these appellees cannot avail themselves of these limitations because this suit was [152—119] commenced before the expiration of the time prescribed, and we only refer to them as showing the purpose of Congress to uphold titles arising under certification or patent by providing that after a certain time the Government, the grantor, therein, should not be heard to question them."

It is obvious that under this language the statute becomes an absolute bar without exception at the ex-

piration of the statutory period. But it is also obvious, and on this ground it is not followed by the Court of Appeals of this Circuit and of the Eighth Circuit, that the question was not involved in that case.

In the United States vs. Chandler-Dunbar Co., reported in 209 U. S. 447, Mr. Justice Holmes delivered the opinion of the Court, Mr. Justice Harlan dissenting. It appeared that the United States there claimed that the patent was void because the land had been previously reserved for public purposes. To this the defendant replied that the land was not reserved, and also set up the statute of limitations under discussion. The Court found it unnecessary to pass on the fact whether the land had or had not been reserved "because we are of opinion that now the patent must be assumed to be good." Justice Holmes said that the land whether reserved or not was public land and open for sale, that the patent had been issued by the President in due form and in the regular way. "Whether or not he had authority to make it, the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect. It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. * * *

"In form the statute only bars suits to annul the patent. But statutes of limitations, with regard to

land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. [153—120] (Citations.) This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See United States vs. Winona & St. P. R. R. Co., 165 U. S. 463,476."

In the decisions of the Circuit Courts of Appeal it is pointed out that in this case no question of fraud was involved. This is true, but it will be noted that Justice Holmes refers specifically to Justice Brewer's opinion where fraud was expressly referred to. It is furthermore pointed out by Justice Holmes that this is not a statute affecting the remedy, over which the chancellor might have control, but a statute establishing and defining the right, one making a patent good at the expiration of the prescriptive time. The Linn & Lane case and the Exploration Company case are now before the Supreme Court, and until that Court has spoken the rule may be considered a doubtful one. Nevertheless, until the Supreme Court has finally decided the matter a due respect for the authority of the Circuit Court of Appeals of this Circuit requires us to follow the decision established in the Linn & Lane case.

The limitations of that case must, however, first be determined and the application thereof made to the facts of the cases at bar.

In the Exploration Company case, as seen from the statement of fact, the six-year period expired in

1902, and the fraud was not discovered until after that period, that is in 1909, the bill being filed in March, 1911. In the Linn & Lane case the patents were dated July, 1902, so that the six-year period expired in July, 1908. The fact that the Linn & Lane Company, by reason of deeds to it fraudulently concealed, was an indispensable party was not discovered until the recording of those deeds in September, 1908. The suit was begun as to the Linn & Lane Company in November, 1908, and it was made a party by an amended bill, [154—121] a subpoena issued, placed in the marshal's hands, and service duly made. In Bailey v. Glover, *supra,* in reliance upon which the Linn & Lane case and the Exploration Company case were decided, the assignee was appointed December 1, 1869, and the two year period of limitation prescribed by the Act expired on December 1, 1871. The bill was filed January 20, 1873, and it was alleged that the fraud complained of was not discovered until two years preceding, that is, in the interval between January, 1871, and January 20, 1873.

In other words, the fraud was not discovered until after the statutory period had run in all three of these cases.

In the cases at bar it is alleged in the amended bills that the fraud was discovered on March 26, 1910, when a special agent's report was received at the General Land Office. This was unlike the facts in the other three cases in that it was plainly within the statutory period of limitations by approximately a month and a half. If the United States had then

proceeded with diligence the question of the statute of limitations would not have arisen. It is obvious that the Government proceeded on the erroneous theory that suits in equity are brought by filing the bill alone, and has incurred the danger of the statute being upheld against it by a tardiness of a day or a few days at most.

This, therefore, is a different case on the facts. Is it a case different in principle? After a careful study and consideration of the matter I am unable to make any distinction.

The problem of the Exploration Company case is stated according to the facts as being one in which the fraud had been concealed until *after* the statutory period had expired. The Court says of the statute: "It is not ambiguous, and its construction is not difficult in ordinary actions of fraud to set aside patents for land." By this may conceivably be meant cases like the present, the exception being applied where no [155—122] question of diligence on the part of the Government could remedy the wrong.

But in the Linn & Lane case, in 203 Fed., it is said, "the suits had been commenced within the period of six years after the discovery of fraud," and that "the fraud was sufficient to toll the statute of limitations." In other words, the rule there plainly indicated is a rule stated in many decisions and embodied, for example, in the Code of Civil Procedure of California, section 338, sub. 4, that the statute does not commence to run until the discovery of the fraud, or until the facts, by the exercise of diligence, might have been brought to light. This result is reached

with some reluctance in view of the fact that the facts of the Linn & Lane case are different, in view also of what the Supreme Court said in the Chandler-Dunbar case, and in view further of the respect due to a patent of the United States and the doctrine predicated thereon of the Maxwell Land Grant case. It seems, however, to be the logical consequence and within the expressed intention of the Linn & Lane case.

It may, of course, be urged that the complainant discovered or was sufficiently informed of the facts prior to the receipt of Mr. Rathbun's report on March 26, 1910, that his knowledge obtained prior thereto, and the knowledge of Snell and other investigating officers in 1906 and 1907 was notice to the Government. It is also urged that the fact that the deeds to the Curtis, Collins & Holbrook Company, executed in the majority of instances in November, 1902 and May, 1903, were not recorded until 1909, 1910 and 1911, was not an act of fraud and did not damage the Government, since even as to the entries where the deeds were not recorded until long after suit filed the Government made the Curtis, Collins & Holbrook Company a party and alleged a conveyance to them by Gregory; and, furthermore, that the great majority of the deeds from the entrymen to Gregory were recorded in 1904 and 1905, a few months after the dates of the patents, and that the assembling of the lands in the name of an [156—123] individual was as much notice of fraud, if any, as the assembling of the lands in the corporation. But all this becomes immaterial when we consider the very

brief period by which the Government failed to bring its suits within the statutory period. If accordingly, the withholding from record of the deeds to Gregory was an act of fraud, certainly under the doctrine of our Court of Appeals the failure to record deeds for even one week after the date of patent would have been sufficient to defeat the plea of the statute in these cases.

The question now arises: Was the withholding of the deeds of the entrymen to Gregory from the record a fraudulent concealment sufficient to toll the statute?

A glance at the annexed schedules will show that as to all patents, for example, dated June 8, 1904, 34 in number, the deeds to Gregory were recorded by Holbrook a few months later, in the interval between August and December, 1904, inclusive. In fact, as to all patents issued on any date in 1904 the deeds were recorded in those months as follows: One in August, thirty on various dates in September, seven on various dates in October, eleven during November and three during December, except one, that of M. J. Self, which was recorded in May, 1905, and except also nine, the recording of which we may infer was overlooked by Holbrook. These nine were recorded by Mr. Shurtleff who became secretary of the company in February, 1906, at various dates in 1909, 1910 and 1911. The deeds to Gregory recorded by Holbrook during his management of the company in 1904 and 1905 were recorded in groups without any apparent design. Since it is known that a patent from the Government does not reach the local office for a period of time, and is not necessarily at

once delivered to the party claiming it, it is probable that Holbrook recorded these deeds to Gregory about the times that he received the patents from the local land office. How he obtained those patents being apparently a stranger to the title does not appear.*

The recording of the deeds from Gregory to the Curtis, Collins & Holbrook Company becomes of no special consequence as far as the issues arising on the plea of the statute of limitations are concerned. Their only importance is now seen to be in connection with the charges of fraud and of their knowledge of fraud. The following discussion is, therefore, out of order in this report, but the digression may be here pardoned since my comment is called for.

It was shown in evidence that when Mr. Shurtleff took charge of the company's affairs the nonrecording of deeds by which the company obtained title was discussed between Mr. Shurtleff and E. S. Collins. All of these deeds were then unrecorded with the exception of deeds covering the entries of Perini, Brase, Gartelman, Carrie L. Ross and Mollie Scott. Perini's Brase's ~~and Gartleman's~~ ran to Frank Sorsoli, and Sorsoli conveyed them to the Curtis, Collins & Holbrook Company, as did Ross and Scott. All of these deeds were executed in June or July, 1904, and were imediately recorded. This was during Mr. Holbrook's management. It is therefore evident that

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[*Note.—Since the above was written, an examination of the Land Office papers has disclosed the delivery of patents to J. E. Pardee, one of Holbrook's attorney's about the time the entrymen's deeds were recorded.] [157—124]

these deeds were recorded because the grantors were parties unknown to Holbrook against whom the usual precaution of recording would be necessary. The same consideration did not hold true in the case of Gregory. The title was allowed to remain in his name of record during all Holbrook's incumbency; since Gregory did not know what lands were in his name and had no interest in the matter except as a trustee for Holbrook it was not likely that he would make a second conveyance to other parties. The explanation offered, and it is a plausible one, was that assessments for taxation were uniformly higher against corporate owners than against individuals, and this appears to me to have been the reason for the withholding of these deeds by Holbrook from record. In view of the fact that deeds to Gregory had already been recorded I do not find it to have any reasonable significance [158—125] in connection with the matter of fraud. After Mr. Shurtleff took charge, however, these deeds were recorded. They were not recorded at once, though he appears to have had his discussion with Mr. Collins some time in 1906. He testifies that he gave directions to a clerk in his office to record the deeds, and that they were not withheld from record with any fraudulent design. Mr. Shurtleff's position at the bar of this Court is such that his testimony would carry great weight, but I am unwilling to rest my conclusion on this fact. The dates of recording of these deeds, however, furnish ample evidence that the delay in recording was not done in pursuance of any fraudulent design on his part, or on that of the company which he represented.

They were recorded as will be seen from the tables at various times during 1909, 1910 and 1911, generally in groups, and without discoverable design whatever. Mr. Shurtleff testifies that he first heard of the investigation of these entries in 1908 or 1909. This knowledge evidently had no effect on the matter of the recordation of the deeds. They went on record at various times in 1909, 1910, and at various times, after these suits were begun, in 1911. I cannot see anything in this that, under all the circumstances, suggests any fraudulent concealment. Why they were so held from record, except for the reason regarding taxes or the neglect in Mr. Shurtleff's office, is not clear.

I come now after this digression to the question whether or not Holbrook's withholding from record of the deeds to Gregory until after the patents were issued was such a fraudulent concealment as would stay the running of the statute of limitations. As to all the patents here concerned this is the fact except in ~~the entry of J. L. Gray,~~ the entries of Perini, Brase, Gartelman, and the entries of Carrie L. Ross, Fred Scott and Mollie Scott. The deed from Gray to Gregory was recorded September 14, 1904, and the patent did not issue until April 17, 1905. The deeds of Perini, Brase and Gartelman and of Sorsoli to the Curtis, Collins & Holbrook [159—126] Company were recorded immediately after their execution in June and July, 1904, though the patents were not issued until December 1, 1904. Likewise the deed to Carrie L. Ross to the company, dated July, 1904, and of Mollie Scott dated, June, 1904,

were recorded respectively in August and June of that year, though the patents were not issued in those cases until 1908. I have already stated, *supra,* ——, that while the recordation of these deeds from the entrymen might conceivably have been delayed by Holbrook until patent was assured in order to save recording fees, the most obvious, and to me the necessary conclusion is that Holbrook's reason was to avoid bringing to the attention of the Government prior to patent the fact that all these lands had passed into one ownership. Assuming as we must, for the purpose of this discussion, that there existed original frauds, then the withholding of these deeds was a fraudulent concealment and the running of the statute would be stayed at least until some period during the period of recordation of these deeds. The fact that the few deeds mentioned were recorded before patent does not change this conclusion, since the recording of six deeds would not indicate any general plan of engrossment. [160—127]

There finally remains for examination the contention of the defendant company that the Government prior to the issuance of patents in these cases was affected with notice of the facts in those entries sufficient so that by the exercise of diligence the fraud would have been discovered; that in consequence there is no occasion for the operation of the rule of the Linn & Lane case that the statute does not begin to run until discovery of the fraud; on this contention obviously, the statute would run from the dates of the patents. The evidence which is relied upon consists of certain reports of Spe-

cial Agents in some of these consolidated causes as follows: Report of Special Agent High, dated July 20, 1903, on the entry of John Zuschlag, Exhibit "G"; of the same special agent on the same date in regard to Joseph J. Kelley, Exhibit "H"; of Special Agent Schlierholz, dated July 26, 1903, in regard to the entry of Edward Brase, Exhibit "I"; also as regards the entries of James Perini, and Herman Gartelman. All of these reports were made shortly after final proof. They recommend cancellation of the entries on the ground that the evidence shown by the Land Office record and that secured by the special agents show that the entrymen were taking up the land with the expectation of selling it for a higher price, and that this constituted speculation. With regard to the cases of Kelley and Zuschlag there appears nothing that would affect any entry except those; as to these the evidence shows that the Government acted in favor of the entries on the authority of the Donohue case. There is little in the reports of Schlierholz of general application. The special agent in his examination of Brase speaks at one time of a big excitement about taking up land, and that "everybody took up land in that neighborhood." There is nothing in this to affect the Government with notice; that much was disclosed by its own files and would not indicate fraud. Schlierholz elicited the fact also that Brase, Gartelman and Perini were shown their lands by Arthur Elam, and that Elam was in the employ "of the sawmill of Curtis, [161—128] Collins & Holbrook Company." This, to be sure, indicates

that the defendant corporation was at that time known, but it does not show any fraud of general application.

The respondent also offered in evidence the reports of special agents found in the files of a number of entries which were subsequently canceled. These are Respondent's Exhibits letters "K" to "V," inclusive, found in the Transcript, p. 3421, and following. These are reports of Special Agent High, dated variously in February, 1904, and Special Agent Cullom, in February, 1903. There is evidence shown in the reports that Mr. High was working on the cases involved in the reports in the fall of 1902. The reports of High in the different cases are practically identical, and it will be sufficient to examine one to determine whether there is sufficient evidence to show the Government was informed or put on notice of the facts as regards all these cases in which the plea of the statute of limitations has been made.

For example, in Exhibit "K," in a letter of February 14, 1904, to the Commissioner of the General Land Office, Mr. High referred to a number of canceled entries and said (Tr. 3422): "I think the facts will develop that Mr. Holbrook is the beneciary of these entries; that he furnished Mr. Tuman the money with which to have the lands paid for to the United States, and that Mr. Tuman passed it over to Mr. Bunnell who supplied the Branley family with checks to be paid to the Receiver. That it was a straight case of procured entries, and that Mr. Holbrook is the beneficiary, though the direct

evidence may not be made of record in the County Recorder's office. * * * All of the above facts apply substantially to the entries of Maggie Branley, Fred Scott, Mollie Scott, Mrs. Carrie Ross and her husband, Elmer E. Ross, the last four of which you have passed for patent. All of the above are a part of a large group of procured entries, which I have been watching and endeavoring to get evidence concerning [162—129] them. * * * From my acquaintance with the existing condition in this district, I would say that the ultimate beneficiary of this entry furnished the money to purchase the land with the intention and expectation that the title should vest in himself. * * * It was really one transaction, with a broken trial, but a plain one."

Respondent's Exhibit "L" is a fair example of one of Mr. Cullom's reports; it is dated February 23, 1903. There is noted (Tr. 3436) that a notary's record in Greenville showed acknowledgment of signature to a deed made October 2, 1902, transferring timber land to Charles E. Gregory; that the applicant apparently owned no other land than that entered. He speaks also of J. H. Heppe and Elam.

Certainly as regards Cullom's report there is nothing to put the Government on notice of widespread frauds by reason of the simple information obtained from the notary's record that the land had been sold to Gregory. As regards High's report, the only significant point therein, as exact knowledge of the facts as regards the entries reported on, is his statement that the entries named by him

are "part of a large group of procured entries which I have been watching and endeavoring to get evidence concerning them." Whatever may be the effect of this report as regards the entries specifically named, it cannot reasonably be said that because a special agent reports to the Government his suspicion of the existence of widespread fraud, that the Government is thereby put on notice of the facts which its agent was not able to ascertain.

There is nothing, therefore, in these reports to the Government which substantiates the contention that as to the cases in which the statute is pleaded the Government should have known the facts before patent. In all these cases, therefore, on the authority of United States vs. Linn & Lane Timber Company, [163—130] it must be held that the defense of the statute of limitations is not well founded.

SUMMARY OF SPECIAL FINDINGS AND CONCLUSIONS IN THIS CASE.

I have already found all the facts in this case in various places throughout this long report. Without casting aside such findings, and without attempting to follow in detail the allegations of the bill, many of which are admitted, a summary of the essential findings as to the entry of Edward L. Cooksey may be made as follows:

1. That said Cooksey's sworn statement, dated August 2, 1902, was false in that prior thereto he had entered into an agreement with J. E. Remick whereby Cooksey had agreed with J. E. Remick to sell the land entered to such person as said

Remick should name at a profit of not less than $100 after final certificate had issued, and whereby said Remick agreed that his principal would buy the same from Cooksey on the said terms; that said Remick at the time was acting in behalf of G. E. Tuman; that said Tuman was at that time in partnership with Charles H. Holbrook for the purpose of dealing in this and other timber lands; that the United States at no time prior to or at the time of the issuance of patent had notice of said agreement and was deceived by said false statement; that said entrymen obtained the said patent from the United States by fraud as aforesaid.

2. That the said land so patented by the United States to Edward L. Cooksey was conveyed by said Cooksey on the 25th day of October, 1902, to Charles E. Gregory at a profit to Cooksey of $100 paid by Remick in behalf of Tuman; that the said deed was recorded at the request of C. H. Holbrook, Jr., acting in behalf of and at the direction of his father, C. H. Holbrook, on September 10, 1904, in the proper records; that the patent was issued to said Cooksey on the 8th of June, 1904; that the said Charles E. Gregory was a trustee for said Charles H. Holbrook in taking and holding [164—131] title to said land; that said Charles E. Gregory by direction of said C. H. Holbrook on May 2, 1903, conveyed the land involved in this suit and described in said patent to Curtis, Collins & Holbrook Company, a corporation of California; that said conveyance was made in pursuance of a prior contract between said C. H. Holbrook, on the one hand, and T. D. Collins and J. G.

Curtis on the other, whereby Holbrook agreed to sell to Curtis and Collins or said corporation, if so directed by Curtis and Collins, and said Curtis and Collins agreed to buy from said Holbrook the lands described in said deed at the rate of either $7.50 or $10.00 per acre, part cash and part stock of said company; that on or about May 2, 1903, said corporation in consideration of said conveyance to it, issued to the said Curtis and the said Collins its stock at the rate of either $7.50 or $10.00 per acre conveyed, and said Curtis and said Collins paid to said C. H. Holbrook a valuable consideration for said conveyance to said corporation, namely, part cash and part stock of said corporation transferred to said Holbrook, the total purchase price so paid being at the rate of $7.50 or $10.00 per acre; that on May 2, 1903, neither said T. D. Collins nor J. G. Curtis, nor the Curtis, Collins & Holbrook Company knew or were charged with knowledge of said fraud hereinbefore set forth, or any fraud at all; and the said Curtis and Collins and the said corporation did not know and did not become charged with knowledge of said or any other fraud in the obtaining of said patent until on or about the year 1908; that the said Curtis, Collins & Holbrook Company, a corporation, was therefore at the time of its acquisition of the land conveyed to said Cooksey by said patent a *bona fide* purchaser for a valuable consideration and without notice or knowledge of any fraud against the United States; that said deed to said corporation was re-

corded in the proper office at the request of said company on October 18, 1909.

3. That the United States did not discover the fraud above set forth and was not informed of facts sufficient to put it upon [165—132] notice of said fraud until within six years prior to the beginning of this suit.

From all the above findings of fact, I conclude:

That a decree should be made and entered dismissing the bill of complaint in the case of United States vs. Edward L. Cooksey et al., No. 15,077.

(Sgd.) H. M. WRIGHT,
Standing Master in Chancery. [166—133]

Schedule I.

SCHEDULE SHOWING CASES CONSOLIDATED BY NUMBERS AND NAMES OF ENTRYMEN DEFENDANTS.

No. 15,077. Edward L. Cooksey.
15,078. John Huntington.
15,079. J. Warren Stark.
15,080. Leonard C. Remick.
15,081. Andrew J. Isenberg.
15,091. Gertie Terrell.
15,092. Thomas W. Burris.
15,093. Ella J. Burris.
15,094. Willard C. Brown.
15,095. Minerva S. Brown.
15,096. Charles S. Pierce.
15,097. Rebecca H. Heppe.
15,098. Nancy Anderson.
No. 15,099. Henrietta Tuman.
15,100. LeRoy Benner.
15,101. James L. Stark.
15,102. Benjamin F. Wardlow.
15,103. Geo. A. Hall.
15,104. Della Hall.
15,105. Reuben J. Mitchell.
15,106. Willis Savercool.
15,107. James Savercool.
15,108. Jacob S. Aid.
15,109. Thomas L. Aid.
15,110. Joseph Ogle.
15,111. Jacob G. Hensley.

No. 15,112. Elijah Taylor.
15,113. Robt. Chas. Taylor.
15,114. Chas. Moore.
15,115. Chas. H. Butler.
15,116. Geo. M. Cooksey.
15,117. Martha L. Zuschlag.
15,118. Henry Clay White.
15,119. Harry E. Johnson.
15,135. Henry D. Morley.
15,136. Mamie Ogle.
15,138. James W. Rhodes.
15,153. Pliny P. Hudson.
15,154. James T. Taylor.

No. 15,155. Mollie Scott.
15,156. Fred Scott.
15,157. Edward Brase.
15,158. Jack Perini.
15,159. Herman Gartelman.
15,163. James D. Baker.
15,164. Mayme H. Baker.
15,165. Ella Udall.
15,166. Alexander Anderson.
15,167. Ellen Spring.
15,168. Carrie Allen.
15,169. Roy Stark.
15,170. L. A. Nissen. [167—134]

No. 15,171. John Kelly.
15,172. A. W. Savercool.
15,173. Sylvester Eastman.
15,174. John L. Gray.
15,175. I. Christensen.
15,176. R. M. Cameron.
15,177. Ira. T. Johnson.
15,178. Joseph I. Kelley.
15,179. Emma L. Kelley.
15,180. M. J. Self.
15,181. John Vanornum.
15,186. Margaret J. Baker.
15,187. Geo. D. Gardenhire.
15,188. Chas. J. Monroe.
No. 15,189. Wm. J. Gardenhire.
15,190. Chas. J. Allen.
15,191. Mabel Chamberlin.
15,192. Della Kelly.
15,193. Frank Kruger.
15,194. Lillian Savercool.
15,195. John W. Aid.
15,196. James D. Aid.
15,197. H. M. Smith.
15,198. R. C. Wilcox.
15,199. Florence Wilcox.
15,200. John Zuschlag.
15,202. Carrie L. Ross. [168—135]

Schedule II.

COMPARATIVE TABLE SHOWING DATES OF SWORN STATEMENTS, REGISTER'S CERTIFICATES OF PURCHASE AND ENTRYMEN'S CONVEYANCES, ARRANGED ACCORDING TO DATES OF ENTRY.

Name of Entryman.	Date of Sworn Statement.	Date of Register's Certificate.	Date of Execution of Deed.
James D. Baker.	June 9, 1902.	August 23, 1902.	August 25, 1902.
Margaret J. Baker.	June 9, 1902.	August 29, 1902.	Sept. 6, 1902.
Mayme H. Baker.	"	July 30, 1902.	"
Gertie Terrell.	June 16, 1902.	Sept. 3, 1902.	Sept. 11, 1902.
Ella E. Udall.	June 23, 1902.	Sept. 13, 1902.	Oct. 17, 1902.
Thomas W. Burris.	"	"	"
Ella J. Burris.	"	"	"
W. C. Brown.	"	Sept. 8, 1902.	Sept. 16, 1902.
Minerva S. Brown.	"	"	"
Charles S. Pierce.	"	"	"
Rebecca H. Heppe.	"	"	"
Nancy Anderson.	July 5, 1902.	Sept. 24, 1902.	Oct. 3, 1902.
Alexander Anderson.	"	"	"
Geo. D. Gardenhire.	July 12, 1902.	Sept. 22, 1902.	Sept. 27, 1902.

Name of Entryman.	Date of Sworn Statement.	Date of Register's Certificate.	Date of Execution of Deed.
W. J. Gardenhire.	July 12, 1902.	Sept. 20, 1902.	Sept. 26, 1902.
LeRoy Benner.	"	Sept. 22, 1902.	Sept. 30, 1902.
Chas. J. Monroe.	"	Sept. 20, 1902.	Sept. 22, 1902.
Henrietta Tuman.	July 14, 1902.	"	Jan. 26, 1903.
Ellen Spring.	July 18, 1902.	Oct. 3, 1902.	Oct. 14, 1902.
Carrie Allen.	"	"	"
Chas. J. Allen.	"	"	"
Pliny P. Hudson.	July 29, 1902.	October 18, 1902.	October 28, 1902.
Edward L. Cooksey.	August 2, 1902.	October 16, 1902.	October 25, 1902.
John Huntington.	August 2, 1902.	"	" [169—136]
J. Warren Stark.	Aug. 12, 1902.	Oct. 25, 1902.	Nov. 11, 1902.
James L. Stark.	"	"	"
Roy Stark.	"	"	Feb. 3, 1903.
L. C. Remick.	"	"	Nov. 10, 1902.
L. A. Nissen.	Aug. 16, 1902.	Nov. 7, 1902.	Nov. 26, 1902.
B. F. Wardlow.	Aug. 20, 1902.	Nov. 6, 1902.	Nov. 6, 1902.
James T. Taylor.	"	"	Nov. 10, 1902.

Name of Entryman.	Date of Sworn Statement.	Date of Register's Certificate.	Date of Execution of Deed.
Geo. A. Hall.	Aug. 20, 1902.	Nov. 6, 1902.	Nov. 7, 1902.
Della Hall.	"	"	"
Mabel Chamberlin.	"	"	"
Andrew J. Isenberg.	Aug. 21, 1902.	Nov. 7, 1902.	Nov. 13, 1902.
John H. Kelly.	Aug. 25, 1902.	Nov. 13, 1902.	Dec. 4, 1902.
Della P. Kelly.	"	"	"
Frank E. Kruger.	"	"	"
Reuben J. Mitchell.	Aug. 30 1902.	Nov. 18, 1902.	Nov. 18, 1902.
Lillian E. Savercool.	Sept. 2, 1902.	Nov. 22, 1902.	Dec. 3, 1902.
A. W. Savercool.	"	"	"
Willis Savercool.	"	"	"
James Savercool.	"	"	"
Jacob S. Aid.	Sept. 5, 1902.	Nov. 21, 1902.	Dec. 9, 1902.
Thos. L. Aid.	"	"	"
James D. Aid.	"	"	"
John W. Aid.	"	"	"
J. W. Rhodes.	"	"	Dec. 4, 1902.

Name of Entryman.	Date of Sworn Statement.	Date of Register's Certificate.	Date of Execution of Deed.
Mamie Ogle.	Sept. 11, 1902.	Nov. 26, 1902.	Nov. 26, 1902.
Joseph Ogle.	"	"	"
S. G. Eastman.	"	"	"
Jacob G. Hensley.	"	"	"
James L. Gray.	Sept. 15, 1902.	Nov. 29, 1902.	Dec. 1, 1902. [170—137]
Elijah Taylor.	Sept. 15, 1902.	Nov. 29, 1902.	Dec. 1, 1902.
Robt. C. Taylor.	"	"	"
Chas. Monroe.	"	"	"
C. H. Butler.	"	"	"
I. M. Christensen.	Sept. 16, 1902.	Dec. 3, 1902.	June 11, 1904.
Robert Cameron.	"	"	"
H. M. Smith.	"	"	Dec. 4, 1902.
Ira T. Johnson.	Sept. 20, 1902.	Dec. 13, 1902.	Dec. 13, 1902.
Harry E. Johnson.	"	"	"
Roscoe C. Wilcox.	Sept. 23, 1902.	Dec. 24, 1902.	March 6, 1903.
Florence Wilcox.	"	"	"
H. D. Morley.	Sept. 24, 1902.	"	Dec. 19, 1902.

Name of Entryman.	Date of Sworn Statement.	Date of Register's Certificate.	Date of Execution of Deed.
G. M. Cooksey.	Sept. 27, 1902.	Jan. 5, 1903.	Dec. 27, 1902.
Edward Brase.	"	March 16, 1904.	March 25, 1904.
James Perini.	"	"	"
Herman Gartelman.	"	March 9, 1904.	June 8, 1904.
Joseph I. Kelley.	Sept. 29, 1902.	Dec. 19, 1902.	March 7, 1903.
Emma L. Kelley.	"	"	"
John Zuschlag.	"	"	"
Martha Zuschlag.	"	"	March 17, 1903.
Mollie Scott.	"	Feb. 24, 1904.	June 10, 1904.
Fred Scott.	"	"	"
Carrie L. Ross.	"	Feb. 23, 1904.	July 25, 1904.
Henry Clay White.	Oct. 20, 1902.	April 28, 1903.	June 24, 1903.
John Vanornum.	Oct. 31, 1902.	Jan. 26, 1903.	Feb. 24, 1903.
M. J. Self.	Nov. 7, 1902.	Feb. 16, 1903.	March 7, 1903.

NOTE.—The date of Register's certificate has been taken in this table instead of date of final proof; in most cases they were the same. G. M. Cooksey appears to be the only case where he conveyed [171—138] prior to his final proof, which occurred on the same day as the date of his Register's certificate, January 5, 1903. In all other cases conveyance was made after final proof. H. D. Morley, for example, made final proof on December 19, 1902, and conveyed the same day, though his certificate is dated Decembe r 24, 1902. [172—139]

Schedule III.

SCHEDULE SHOWING DATES OF PATENTS AND DATES OF RECORDING ENTRYMEN'S DEEDS.

Dates of Patents.	Entrymen.	Dates of recording entrymen's deeds.	Deeds recorded before or after patent.
June 8, 1904.	Geo. M. Cooksey.	August 4, 1904.	After.
"	Thos. W. Burris.	Sept. 4, 1904.	"
"	Nancy Anderson.	Sept. 10, 1904.	"
"	Jacob G. Hensley.	"	"
"	H. E. Johnson.	"	"
"	Willis Savercool.	"	"
"	Chas. S. Pierce.	"	"
"	Henry Clay White.	"	"
"	Henrietta Tuman.	"	"
"	Martha L. Zuschlag.	"	"
"	Edward L. Cooksey.	"	"
"	Warren Stark.	Sept. 12, 1904.	"
"	Thomas L. Aid.	Sept. 14, 1904.	"
"	Minerva S. Brown.	"	"

Dates of Patents.	Entrymen.	Dates of recording entrymen's deeds.	Deeds recorded before or after patent.	
June 8, 1904.	Willard C. Brown.	Sept. 14, 1904.	After.	
"	LeRoy Benner.	"	"	
"	Rebecca H. Heppe.	"	"	
"	John Huntington.	"	"	
"	Della Hall.	"	"	
"	Reuben J. Mitchell.	"	"	
"	Elijah Taylor.	"	"	
"	Chas. H. Butler.	Sept. 14, 1904.	"	
"	Ella J. Burris.	Sept. 23, 1904.	"	
"	Andrew J. Isenberg.	"	"	
"	Chas. Moore.	"	"	[173—140]
"	Gertie Terrell.	Sept. 23, 1904.	"	
"	Robert C. Taylor.	"	"	
"	Joseph Ogle.	"	"	
"	Geo. Hall.	Oct. 3, 1904.	"	
"	James L. Stark.	"	"	
"	Leonard C. Remick.	"	"	

Dates of Patents.	Entrymen.	Dates of recording entrymen's deeds.	Deeds recorded before or after patent.
June 8, 1904.	Benj. F. Wardlow.	Nov. 30, 1904.	After.
(34) "	James Savercool.	Dec. 10, 1904.	"
"	Jacob S. Aid.	Dec. 14, 1904.	"
June 27, 1904.	James W. Rhodes.	Sept. 14, 1904.	"
"	H. D. Morley.	Dec. 6, 1904.	"
(3) "	Mamie Ogle.	Dec. 14, 1904.	"
July 26, 1904.	James D. Baker.	Sept. 10, 1904.	"
"	S. G. Eastman.	Oct. 3, 1904.	"
"	Emma L. Kelley.	"	"
(4) "	Ira T. Johnson.	Sept. 10, 1904.	"
Aug. 16, 1904.	Ellen Spring.	Nov. 12, 1904.	"
"	Joseph I. Kelley.	Nov. 30, 1904.	"
"	John Zuschlag.	Dec. 2, 1909.	(2) "
"	I. M. Christensen.	Dec. 2, 1909.	"
"	Robert Cameron.	Dec. 2, 1909.	"
(6) Aug. 16, 1904.	Henry M. Smith.	March 28, 1910.	"

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Dates of Patents.	Entrymen.	Dates of recording entrymen's deeds.		Deeds recorded before or after patent.	
August 28, 1904.	Ella E. Udall.	Nov. 12, 1904.		After.	
(2) "	Pliny P. Hudson.	Oct. 18, 1909.	(2)	"	
Sept. 9, 1904.	John Vanornum.	Oct. 29, 1904.		"	
"	James D. Aid.	Nov. 11, 1904.		"	
"	A. W. Savercool.	"		"	
"	John H. Kelly.	Nov. 12, 1904.		"	
(5) Sept. 9, 1904.	Della Kelly.	"		"	[174—141]
Sept. 15, 1904.	Mayme H. Baker.	Nov. 12, 1904.		"	
"	Carrie Allen.	March 28, 1910.		"	
(3) "	Margaret Baker.	April 18, 1910.	(2)	"	
Sept. 27, 1904. (1)	Alexander Anderson.	Nov. 12, 1904.		"	
Oct. 28, 1904.	L. A. Nissen.	Nov. 2, 1909.		"	
(2) "	W. J. Gardenhire.	April 18, 1910.		"	
Dec. 1, 1904.	Herman Gartelman. (Sorsoli's deed.)	June 11, 1904.		Before.	
"	James Perini. (Sorsoli's deed.)	July 5, 1904.		Before.	

Dates of Patents.	Entrymen.	Dates of recording entrymen's deeds.		Deeds recorded before or after patent.
(3) Dec. 1, 1904.	Edward Brase.			Before.
	(Sorsoli's deed.)	July 5, 1904.		
Dec. 30, 1904.	M. J. Self.	May 23, 1905.		After.
(2) "	G. D. Gardenhire.	March 8, 1911.	(2)	"
January 19, 1905.	James T. Taylor.	Oct. 18, 1909	(2)	"
"	Chas. J. Allen.	March 28, 1910.		"
(3) "	Mabel Chamberlin.	Feb. 25, 1911.	(2)	"
March 18, 1905. (1)	Lillian Savercool.	March 28, 1910.		"
Apr. 17, 1905. (1)	James L. Gray.	Nov. 26, 1909.		"
May 1, 1906.	Roy Stark.	Nov. 2, 1909.		"
"	Frank E. Kruger.	Feb. 25, 1911.	(2)	"
"	John W. Aid.	Feb. 25, 1911.	(2)	"
(4) "	Chas. J. Monroe.	March 8, 1911.	(2)	"
January 10, 1908. (1)	Carrie L. Ross.	Aug. 3, 1904.		Before.
February 27, 1908. (1)	Mollie Scott.	June 13, 1904.		Before.
June 4, 1908. (1)	Fred Scott.	June 13, 1904.		Before.

Dates of Patents.	Entrymen.	Dates of recording entrymen's deeds.		Deeds recorded before or after patent.
Nov. 1, 1909.	R. C. Wilcox.	March 8, 1911.	(2)	After.
(2) "	Florence Wilcox.	March 8, 1911.	(2)	"

PATENTS ACCOUNTED FOR: 79.

NOTE.—1. Underscoring of dates above indicates deeds recorded after C. A. Shurtleff became Secretary in February, 1906; all others being recorded under the management of C. H. HOLBROOK, Vice-president. The figure "(2)" after date of record indicates that a deed to Gregory and a deed from Gregory to the Curtis, [175—142] Collins & Holbrook Company were recorded on the same date.

NOTE 2.—The above shows that in six cases where the Curtis, Collins & Holbrook Company bought direct from entrymen the deeds were recorded at once prior to patent. In all other cases the deeds from entrymen to Gregory were recorded after patent had issued. Where patents issued in 1904 deeds were, as a rule, recorded by Holbrook during that year: One in August, twenty-eight in September; seven in October; eleven in November; four in December. To this general practice there were nine exceptions, one deed, that of Self, being recorded in May, 1905, while Holbrook was in charge, and eight others which conceivably may have been overlooked by him, and were recorded by Mr. Shurtleff at various dates during 1909, 1910 and 1911.

The compilation suggests that Holbrook recorded the Gregory deeds approximately as he received the patents from the Land Office. The dates of recording the patents are not in evidence; probably they were recorded at the same time.

The delay in recording deeds under Mr. Shurtleff's management and the order of recordation discloses no governing plan whatsoever. [176—143]

Schedule IV.

DATES OF EXECUTION OF DEEDS FROM GREGORY TO CURTIS, COLLINS & HOLBROOK COMPANY.

Nov. 10, 1902.	Gregory	to	C. C. & H. Co.	Charles J. Allen	land.
Dec. 2, 1902.	"	"	"	Carrie M. Allen	"
"	"	"	"	Alexander Anderson	"
"	"	"	"	Nancy Anderson	"
"	"	"	"	Minerva S. Brown	"
"	"	"	"	Willard C. Brown	"
"	"	"	"	Leroy Benner	"
"	"	"	"	James D. Baker	"
"	"	"	"	Mayme H. Baker	"
"	"	"	"	Margaret J. Baker	"
"	"	"	"	Thomas W. Burris	"
"	"	"	"	Ella J. Burris	"
"	"	"	"	W. J. Gardenhire	"
"	"	"	"	G. D. Gardenhire	"
"	"	"	"	Rebecca H. Heppe	"

Dec. 2, 1902.	Gregory	to	C. C. & H. Co.	Chas. J. Monroe	land.	
"	"	"	"	Chas. S. Pierce	"	
"	"	"	"	Ellen Spring	"	
"	"	"	"	Gertie Terrell	"	
"	"	"	"	Ella E. Udall	"	
May 2, 1903.	"	"	"	John W. Aid	"	
"	"	"	"	James D. Aid	"	
"	"	"	"	Thomas L. Aid	"	
"	"	"	"	Jacob S. Aid	"	
"	"	"	"	Chas. H. Butler	"	
"	"	"	"	Mabel Chamberlin	"	
"	"	"	"	Edward L. Cooksey	"	
"	"	"	"	Geo. M. Cooksey	"	
"	"	"	"	S. G. Eastman	"	[177—144]
"	"	"	"	John L. Gray	"	
"	"	"	"	J. G. Hensley	"	
"	"	"	"	Pliny P. Hudson	"	
"	"	"	"	John Huntington	"	

May 2, 1903.	Gregory to C. C. & H. Co.			Geo. A. Hall	land.
"	"	"	"	Della Hall	"
"	"	"	"	A. J. Izenberg	"
"	"	"	"	Ira T. Johnson	"
"	"	"	"	H. E. Johnson	"
"	"	"	"	Joseph I. Kelley	"
"	"	"	"	Emma Kelley	"
"	"	"	"	Frank Kruger	"
"	"	"	"	John H. Kelly	"
"	"	"	"	Della P. Kelly	"
"	"	"	"	Chas. Moore	"
"	"	"	"	Henry D. Morley	"
"	"	"	"	Reuben J. Mitchell	"
"	"	"	"	Lorenzo A. Nissen	"
"	"	"	"	Joseph Ogle	"
"	"	"	"	Mamie Ogle	"
"	"	"	"	James W. Rhodes	"
"	"	"	"	A. W. Savercool	"

May 2, 1903.	Gregory	to	C. C. & H. Co.	Willis Savercool	land.	
"	"	"	"	James Savercool	"	
"	"	"	"	Lillian Savercool	"	
"	"	"	"	M. J. Self	"	
"	"	"	"	Henry M. Smith	"	
"	"	"	"	James L. Stark	"	
"	"	"	"	J. Warren Stark	"	
"	"	"	"	Roy Stark	"	
"	"	"	"	Robert C. Taylor	"	
"	"	"	"	Elijah Taylor	"	[178—145]
"	"	"	"	James T. Taylor	"	
"	"	"	"	John Vanornum	"	
"	"	"	"	Benj. F. Wardlow	"	
"	"	"	"	Roscoe Wilcox	"	
"	"	"	"	Florence Wilcox	"	
"	"	"	"	L. C. Remick	"	
"	"	"	"	John Zuschlag	"	
"	"	"	"	Martha Zuschlag	"	

Nov. 7, 1903.	Gregory to C. C. & H. Co.	Henry Clay White	land.	
Oct. 15, 1904.	" "	I. M. Christensen	"	
"	" "	Robert Cameron	"	
"	" "	Henrietta Tuman	"	[179—146]

CHRONOLOGICAL ORDER OF DATES OF RECORD OF DEEDS TO CURTIS, COLLINS & HOLBROOK COMPANY.

A. Deeds from entrymen (including two from Sorsoli) to company; recorded at the request of C. H. Holbrook as follows:

Date of record.	Name of Entryman.
June 11, 1904.	H. Gartelman.
June 13, 1904.	Mollie Scott.
	Fred Scott.
July 5, 1904.	Edward Brase (Deed from Sorsoli).
	James Perini (Deed from Sorsoli).
August 3, 1904.	Carrie L. Ross.

B. Deeds from Charles E. Gregory to company (recorded at the request of C. A. Shurtleff, secretary of C. C. & H. Co.)

Date of record.	Name of Entryman.
October 18, 1909.	Edward L. Cooksey.
	Pliny P. Hudson.
	James T. Taylor.
November 2, 1909.	J. Huntington.
	James L. Stark.
	J. Warren Stark.
November 26, 1909.	L. C. Remick.
	A. J. Isenberg.
April 18, 1910.	Margaret J. Baker.
	A. W. Savercool.
	B. F. Wardlow.
	Willis Savercool.

Date of record.	Name of Entryman.
April 18, 1910.	James Savercool.
	Della Hall.
	George Hall. [180—147]
June 7, 1910.	Thomas L. Aid.
	Jacob S. Aid.
	Reuben J. Mitchell.
	James W. Rhodes.
	James D. Aid.
	John H. Kelly.
	Della Kelly.
September 2, 1910.	
	Charles Moore.
	John Zuschlag.
	R. C. Taylor.
	Mamie Ogle.
	S. G. Eastman.
	I. M. Christensen.
	R. M. Cameron.
	Elijah Taylor.
September 10, 1910.	Jacob G. Hensley.
September 22, 1910.	
	W. J. Gardenhire.
October 28, 1910.	Chas. H. Butler.
	George M. Cooksey.
	Henry Clay White.
	Martha Zuschlag.
	Emma Kelly.
	H. M. Smith.
	John Vanornum.
	Carrie Allen.
	L. A. Nissen.

Date of record.	Name of Entryman.
October 28, 1910.	Chas. J. Allen.
	Lillian Savercool.
	James L. Gray.
November 28, 1910.	Joseph I. Kelley.
December 2, 1910.	Joseph Ogle. [181—148]
February 25, 1911.	Nancy Anderson.
	Minerva Brown.
	W. C. Brown.
	LeRoy Benner.
	T. W. Burris.
	Ella J. Burris.
	Rebecca Heppe.
	H. E. Johnson.
	Chas. S. Pierce.
	G. Terrell.
	H. Tuman.
	M. Chamberlin.
	F. E. Kruger.
	John W. Aid.
	Roy Stark.
March 8, 1911.	H. D. Morley.
	J. D. Baker.
	I. T. Johnson.
	E. E. Udall.
	Mayme Baker.
	Alex. Anderson.
	M. J. Self.
	R. Wilcox.
	F. Wilcox.
	George D. Gardenhire.
	Chas. J. Monroe.
March 18, 1911.	Ellen Spring. [182—149]

STIPULATED TABLE AS TO CASES IN WHICH STATUTE OF LIMITATIONS IS RELIED ON.

	Number.	Date of Patent.	Bill Filed.	Sub. Iss.	Rec. by Mar.	Del. to Dep.	Served.	Name of Deputy.
Edward L. Cooksey, C. C. & H.	15,077	6/8/04	6/7/10	6/9	6/9	6/11	7/22	Warner
John Huntington, C. C. & H.	15,078	"	"	"	"	"	"	"
J. Warren Stark C. C. & H.	15,079	"	"	"	"	"	"	"
Leonard C. Remick, C. C. & H.	15,080	"	"	"	"	"	"	"
Andrew J. Isenberg, C. C. H.	15,081	"	"	"	"	"	"	"
Gertie Terrell, C. C. & H.	15,091	"	"	"	"	"	"	"
Thos. W. Burris C. C. & H.	15,092	"	"	"	"	"	"	"
Ella J. Burris C. C. & H.	15,093	"	"	"	"	"	"	"
Willard C. Brown, C. C. & H.	15,094	"	"	"	"	"	"	"
Minerva S. Brown, C. C. & H.	15,095	"	"	"	"	"	"	"
Chas. S. Pierce, C. C. & H.	15,096	"	"	"	"	"	"	"
Rebecca H. Heppe, C. C. & H.	15,097	"	"	"	"	"	"	"
Nancy Anderson, C. C. & H.	15,098	"	"	"	"	"	"	"
Henrietta Tuman C. C. & H.	15,099	"	"	"	"	"	"	"
LeRoy Benner, C. C. & H.	15,100	"	"	"	"	"	"	"

	Number.	Date of Patent.	Bill Filed.	Sub. Iss.	Rec. by Mar.	Del. to Dep.	Served.	Name of Deputy.
James L. Stark, C. C. & H.	15,101	6/8/04	6/7/10	6/9	6/9	6/11	7/22	Warner
Benj. F. Wardlow, C. C. & H.	15,102	"	"	"	"	"	"	"
Geo. A. Hall, C. C. & H.	15,103	"	"	"	"	"	"	"
Della Hall, C. C. & H.	15,104	"	"	"	"	"	"	"
Reuben J. Mitchell C. C. & H.	15,105	"	"	"	"	"	"	"
								[183—150]
Willis Savercool C. C. & H.	15,106	"	"	"	"	"	"	"
Jacob S. Aid, C. C. & H.	15,108	"	"	"	"	"	"	"
Thomas L. Aid, C. C. & H.	15,109	"	"	"	"	"	"	"
Jos. Ogle, C. C. & H.	15,110	"	"	"	"	"	"	"
Jacob G. Hensley C. C. & H.	15,111	"	"	"	"	"	"	"
Elijah Taylor C. C. & H.	15,112	"	"	"	"	"	"	"
Robt. Chas. Taylor, C. C. & H.	15,113	"	"	"	"	"	"	"
Charles Moore, C. C. & H.	15,114	"	"	"	"	"	"	"
Chas. H. Butler, C. C. & H.	15,115	"	"	"	"	"	"	"
Geo. Marion Cooksey, C. C. & H.	15,116	"	"	"	"	"	"	"
Martha L. Zuschlag, C. C. & H.	15,117	"	"	"	"	"	"	"

	Number.	Date of Patent.	Bill Filed.	Sub. Iss.	Rec. by Mar.	Del. to Dep.	Served.	Name of Deputy.
Henry Clay White, C. C. & H.	15,118	6/8/04	6/7/10	6/9	6/9	6/11	7/22	Warner
								(34)
Harry E. Johnson, C. C. & H.	15,119	"	"	"	"	"	"	"
Mamie Ogle, C. C. & H.	15,136	6/27/04	6/27/10	6/27	6/27	7/1	7/22	"
Henry Morley, C. C. & H.	15,135	"	"	"	6/29	"	"	"
James W. Rhodes, C. C. & H.	15,138	"	"	"	"	"	"	"
								(3)
James D. Baker, C. C. & H.	15,163	7/26/04	7/25/10	7/25	8/2	8/2	8/2	Kiernan
S. G. Eastman, C. C. & H.	15,173	"	"	"	"	"	"	"
Ira T. Johnson, C. C. & H.	15,177	"	"	"	"	"	"	"
Emma L. Kelly	15,179	"	"	"	"	"	"	"
								(4)

[184—151]

Supplementary Report.

The proceedings in the Master's office for hearing objections to the reports in the consolidated cause and for settling said reports were as follows:

On December 22, 1913, the Master notified counsel of record by mail that in the foregoing case against Edward L. Cooksey, No. 15,077 and in nineteen others, the Master's reports were in draft, and might be inspected in the Master's office on said date. The parties were by said letter of notification required to file with the Master their objections to the said draft reports on or before January 21, 1914, together with their suggestions of amendment, if any. A copy of said letter of notification is hereunto annexed.

On December 29, 1913, the Master mailed counsel a like notification covering nineteen other cases in said consolidated cause, and required objections to be filed on or before January 28, 1914. A copy of said letter of notification is also hereunto annexed.

On January 6, 1914, the Master mailed like letters of notification to counsel covering thirty-four other cases in said consolidated cause and required objections of the parties to be filed with him on or before February 3, 1914. A copy of said letter of notification is also hereunto annexed.

On January 10, 1914, the Master mailed to counsel like letters of notification covering the six remaining cases in said consolidated cause and re-

quired objections thereto to be filed with the Master on or before February 9, 1914. A copy of said letter of notification is also hereunto annexed.

On January 13, 1914, the Master mailed to the parties a letter notifying them of the insertion in the draft reports of certain minor omissions, such as page numbers and citations of authorities and certain corrections. A copy of said letter of notification is also hereunto annexed.

On January 19, 1914, the Master notified counsel by mail that he had completed and annexed to his draft reports certain schedules [185] or tabulations of dates compiled from the reports, to be annexed to the Cooksey report. A copy of said letter is hereunto annexed.

On February 12, 1914, the Master notified counsel of certain oversights by counsel in the way of failure to sign objections and to properly endorse the same and the like and required the same to be properly corrected on or before noon, February 14, 1914. By the same letter the Master extended the time for filing objections not yet filed to include said hour and date, the United States Attorney then being in default in certain cases. A copy of said letter of notification is also hereunto annexed.

In accordance with the said directions of the Master contained in said letters objections were filed by the parties at the times required by the Master's respective orders except as follows: On February 3, 1914, the Assistant United States Attorney requested and obtained leave to file objections due on said day, on February 10, 1914, and

the same were filed on that date. On February 9, 1914, the Assistant United States Attorney requested an extension of one day for the filing of objections to the six cases due on said day, and this time was accordingly extended. Said objections were not, however, filed as required, and on February 12, 1914, the United States then being in default in said cases, the Master of his own motion extended the time for filing all objections not then filed to February 14, 1914, at noon, as appears from the letter herein referred to and annexed. On February 14, 1914, the United States filed the objections due as aforesaid on February 3, 1914.

The United States filed objections to each of the reports in the 79 cases in the consolidated cause. These objections with my file mark showing date of filing are separately returned.

J. G. De Forest, Esq., solicitor for the entrymen, filed objections in seventeen of said causes, identified by numbers as follows: 15,077, 15,078, 15,091, 15,097, 15,101, 15,112, 15,113, 15,135, 15,163, 15,164, 15,168, 15,174, 15,180, 15,181, [186] 15,186, 15,-187, 15,190. Said objections marked with my filing stamp and the date of the filing thereof with the Master are separately returned with these reports.

C. A. Shurtleff, Esq., solicitor for the Curtis, Collins & Holbrook Company, filed in behalf of said company objections to 54 of the reports in said consolidated cause, the ones *not* objected to being the following, described by number: 15,153, 15,154, 15,155, 15,156, 15,157, 15,158, 15,159, 15,165, 15,166, 15,167, 15,169, 15,170, 15,171, 15,172, 15,175, 15,176,

15,178, 15,192, 15,193, 15,194, 15,197, 15,198, 15,199, 15,200, 15,202. All of said objections are identified by my filing stamp together with date of filing thereof and are herewith separately returned.

All of the objections taken by the parties have been carefully read and considered. The objections taken by the Curtis, Collins & Holbrook Company, and by the individual entrymen, as noted above, are all overruled. Of the objections taken by the United States, the second objection in case No. 15,197, United States vs. H. M. Smith et al., pointing to a typist's error, is allowed. That report is corrected upon its face by the Master. All of the other objections taken by the United States to the draft report in all of said cases have been considered and are overruled.

As regards the objections taken to the Master's report in United States vs. Cooksey and in some other matters comment, I think, is called for.

Objection 4, page 2, objections to the Cooksey report, 15,077, is founded on a misunderstanding of the matter objected to at page 66 of the report. The matter objected to is made more clear by additional punctuation and by the insertion of the word "was" in the appropriate place, such corrections being made on the face of the report, as will appear by reference thereto. [187]

Objection 6, page 2, is taken to the Master's finding on page 67 that "during the course of the negotiations Tuman at Holbrook's request wired Holbrook that a named third party was ready to make the purchase on the same terms proposed. This

telegram was false and intended merely as a means of accelerating the confirmation of a bargain with Curtis and Collins," on the ground that the evidence does not show that Curtis and Collins were made aware of this telegram. The point is a minor one, but the objection is not well founded. I have amended the report by inserting therein at the end of the first sentence quoted after the word "proposed" a new sentence as follows: "This telegram was made known to Curtis and Collins (Tr. 1962)." This correction has been made on the face of the report.

Objection 22, page 7, is found upon an erroneous quoting of the Master's report, due possibly to an error in the copy thereof. The original report is in accordance with the Government's contention.

In objection 33, page 12, and following, and in many other objections taken to this report, and in practically all the objections filed by the United States, it is urged that the Master has failed to consider and find certain details claimed to be shown by the evidence. For the purpose of this discussion one such item may be taken as an example, viz.: The question of the payment of publication fees in connection with proceedings in the Land Office upon these entries. The evidence shows that in a few cases only did the entrymen pay these fees. It is not exactly shown who paid the fees in question. The evidence shows that on one occasion J. E. Remick paid in behalf of Tuman to one of the newspapers in Quincy something like $200 or $300. This would not account for all of the

expense on that account. Assuming, however, as maintained by the United States that it may be inferred that in practically all the cases Tuman or his representatives paid for this publication, I have considered this fact immaterial. [188] I have treated the details of these cases with much particularity and the report consequently is very long. Some details such as this I did not deem it necessary to determine or comment upon. The existence of the agreement which constituted the fraud involved must be determined chiefly by what occurred before or at the time of making the sworn statement. What occurred afterwards has been referred to in the reports and considered only in so far as it might tend to show a prior agreement. Publication would be arranged for after this time and the payment would be due about the time of final proof. For all that appears in the evidence payment may have been made by Tuman at the time he arranged for the purchase of the claim. The same comments are to be made as regards my failure to specifically refer to the fact that with the exception of a few entrymen no arrangement was made by the entrymen to pay Heppe or Remick or the other locators and fee for showing them the land. The matter was generally not discussed. All such details as those above noted have been present in my mind and fully considered as regards each case, though not deemed worthy of special comment.

Objection 66A, on page 41, is one that has been given especially careful consideration. A similar

objection will be found in most of the reports herein. In those reports in my summary of findings and conclusions at the end of the reports I have made a finding similar to the following appearing at page 131 of the Cooksey report: "That the said deed was recorded at the request of C. H. Holbrook, Jr., acting in behalf of and at the direction of his father, C. H. Holbrook, on September 10, 1904, in the proper records." This referred in each case to the deed by which the entryman conveyed title to Charles E. Gregory, and this finding was made wherever the deed was recorded prior to February, 1906, when the senior Holbrook severed his connection with the Curtis, Collins & Holbrook Company as vice-president thereof. The objection made is that when said deed was recorded the title to the land was vested in the Curtis, Collins & Holbrook Company, and that the deed was held and recorded [189] by C. H. Holbrook, Jr., as the agent of said company and not of his father. The facts as found show that during the period of his father's connection with the company C. H. Holbrook, Jr., acted as an assistant secretary of the company and was interested in the company as a stockholder. The point made by the Government is thus a cogent one as it would support a contention by the Government that the corporation was itself guilty of a fraud of concealment by withholding the deeds from the record through its agent in possession of the deed. Such deeds to his trustee, Gregory, were of course the property of Holbrook rather than of the corporation, and it

would be for him individually to state when they should be recorded. On further consideration I have no question that Holbrook, Jr., must be considered as acting for his father in the matter of recording the deeds. If, however, I took the view of the Government that the actual recording of these entrymen's deeds was an act on the company through its agent, the case would be the same as those where the entrymen's deeds were not recorded until Mr. Shurtleff took charge as secretary of the corporation. In the later cases plainly the act of recording and the withholding of the deeds from the time they come into Mr. Shurtleff's possession as secretary was the act of the company. I have not considered that fact material. So, as regards the deeds referred to in the findings objected to, it must be considered that if Holbrook, who undoubtedly controlled the action of his son, ordered the deed withheld from record, he did so in his individual capacity to conceal a possible fraud from the Government, and not as an officer of the company, for the reasons already fully considered in my discussion of the defense of purchase for value without notice. In this view, if there is any error in the finding, which I do not admit, it becomes immaterial.

Objection 66 C, page 41 and following, refers to a summarized finding occurring in most of the reports, referring to the conveyance from Gregory as follows: "That said conveyance was made in [190] pursuance of a prior contract between C. H. Holbrook, on the one hand, and T. D. Collins and J. G.

Curtis, on the other, whereby Holbrook agreed to sell to Curtis and Collins or to said corporation, if so directed by Curtis and Collins, and said Curtis and Collins agreed to buy from said Holbrook the lands described in said deed at the rate of either $7.50 or $10.00 an acre, and said Curtis and said Collins paid to said C. H. Holbrook a valuable consideration for said conveyance to said corporation, namely, part cash and part stock of said corporation transferred to said Holbrook, the total purchase price so paid being at the rate of $7.50 or $10.00 per acre." It is objected that the evidence established that Holbrook had no timber land to sell; that it was at the time the contract was made vacant Government land, and other objections based on the Government's theory of this case. I have seriously doubted whether this finding should not be amended to describe*d* more accurately the matter in question. It is true that at the time the contract was made, some time in the summer of 1902, a large part at least of the lands subsequently acquired was vacant Government land not then belonging to Holbrook. When in the above extract of findings I describe the agreement as covering "lands described in said deed," it would be inaccurate if it were to convey the idea that in this early contract the land was specifically described or tabulated. This finding, however, perhaps could be improved; but I have in all cases stated, in the opening of the Summary of Findings that they are not intended to supersede or set aside what has already been found at length in the reports. The

general discussion in the Cooksey report clearly shows all the facts in this regard. It shows that Collins and Curtis and Holbrook first entered into a contract in writing covering lands to be scripped. This contract follows practically the wording of the finding under discussion, though at that time it was true that the land was Government land and that Holbrook had a schedule of specific lands which with other timber lands in Plumas and Lassen counties he intended to secure by the [191] application of scrip. All that was done as regards these timber and stone entries has been set forth fully in the report. Holbrook said that some of the lands already cruised and desirable for purchase could not be obtained by scrip, and that these and other desirable lands could be bought if timber and stone titles were acceptable. Curtis and Collins agreed to take such lands if the titles were good, and the price was agreed upon. In other words, the written contract which in terms included the securing of lands by means otherwise than by the application of scrip was considered to be still applicable and was extended to lands based on timber and stone entries, and a new price was agreed upon, at first $7.50 and later $10.00. The finding therefore is justified in its phrasing by the terms of the original written contract and read in connection with what has been said in the reports in fuller form is not, I think, an inaccurate expression of my views.

There remains for consideration only objection 71, on page 48, together with similar objections

contained in the other reports. The United States assigns as ground of objection and as an arbitrary abuse of discretion on the part of the Master his denial of a request for additional time in which to file objections. The objection sets forth that when the notice of December 22, 1913, covering the first twenty cases announced in draft was given to the United States Attorney the notice required that objections should be filed to the reports on or before January 21, 1914, and stated that the time would not be extended; that on January 19, 1914, the Assistant United States Attorney asked for additional time, which was denied. The statement in the objection is inaccurate in that it states that the request for additional time was made as to all objections which would be due thereafter. It was in fact made and denied only as to those required to be filed on January 21, 1914. The objection does not seem worthy of serious consideration in view of the fact that apparently the Government has not been injured; since all the objections were filed as ordered by the [192] Master and apparently in full and sufficient detail. It has been shown above that having secured his desire that the first objections should be filed for his consideration at the time noted, the Master thereafter on several occasions extended the time of the United States Attorney even after a default. In setting the times within which these objections should be filed, the Master took no account of the engagements of the United States Attorney, and was not required to do so. He took account only of the state of busi-

ness in the Master's office which required that this matter should be disposed of at a reasonably early date, so as not to be unduly delayed by other matters which would require the Master's attention, if time for filing objections was extended. The Master deemed it sufficient time to cover the main report in the Cooksey case and the other nineteen reports to allow practically one month. The other objections were required at intervals of approximately one week thereafter, or one month from the time of the announcement of the draft reports. In other words, the Master considered that the attorneys should be able to frame objections at the same speed as the Master was able to accomplish the writing of his reports. The objection, therefore, seems entirely without any merit. In each of the objections filed to the other draft reports the United States has stated in the form of an objection the fact that many of the objections were necessarily made not in full, but by reference to corresponding objections in the case of Cooksey, 15,077, for the reasons above quoted in objection 71 in the Cooksey report.

This statement is rather extraordinary in view of the fact that in his letter of December 22, 1913, the Master had recommended to the parties that this practice be observed.

Except as above noted all the objections of the United States are overruled. The foregoing report in the case of United States vs. Cooksey, 15,077, is accordingly settled, signed and filed as my

final report herein, and the parties notified by mail this 21st day of February, 1914.

H. M. WRIGHT,
Standing Master in Chancery. [193]

At a stated term, to wit, the March term, A. D. 1911, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 1st day of May, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,077.

THE UNITED STATES OF AMERICA
vs.
EDWARD L. COOKSEY et al.

Minutes of Court—May 1, 1911—Order of Reference.

Upon motion of R. T. Devlin, United States Attorney, and by consent of the attorneys for defendants, it was ordered that this suit be and the same is hereby referred to H. M. Wright, Master in Chancery of this court, to take and return the evidence herein and report to the Court his findings of fact and conclusions of law thereon.

I hereby certify that the foregoing is a full, true and correct copy of an original order made and entered in the therein entitled cause.

Attest my hand and seal of said Circuit Court this 2d day of May, A. D. 1911.

[Seal] SOUTHARD HOFFMAN,
Clerk.
By W. B. Maling,
Deputy Clerk. [194]

At a stated term, to wit, the July term, A. D. 1913, of the District Court of the United States of America in and for the Northern District of California, Second Division, held at the courtroom, in the City and County of San Francisco, on Monday, the 29th day of September, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,077.

THE UNITED STATES OF AMERICA
vs.
EDWARD L. COOKSEY et al.

Minutes of Court—September 29, 1913—Order Referring Motion for Leave to File Second Amendment to Bill of Complaint to Standing Master.

Upon motion of E. H. Pier, Assistant U. S. Attorney, and by consent of defendants, it was ordered that complainant's motion for leave to file second amendment to bill of complaint be and the

same is hereby referred to Hon. H. M. Wright, the Standing Master, to hear said motion and to report his conclusions thereon. [195]

December 22, 1913.

Benj. L. McKinley, Esq.,
United States Attorney,
Earl H. Pier, Esq.,
Asst. United States Attorney,
Charles A. Shurtleff, Esq.,
J. G. De Forest, Esq.,
Attorneys for Defendants.
San Francisco, Cal.

Dear Sirs:

In the following causes of the United States vs. Curtis, Collins & Holbrook and others, namely:

Edward L. Cooksey,	No. 15,077
John Huntington,	15,078
J. Warren Stark,	15,079
Leonard E. Remick,	15,080
Andrew J. Isenberg,	15,081
Gertie Terrell,	15.091
Thomas W. Burris,	15,092
Ella J. Burris,	15,093
Willard C. Brown,	15,094
Minerva S. Brown,	15,095
Charles S. Pierce,	15,096
Rebecca H. Heppe,	15,098
James L. Stark,	15,101
Roy Stark,	15,169
Ella E. Udall,	15,165
Alexander Anderson,	15,166
Nancy Anderson,	15,098

Lorenzo A. Nissen,	15,170
Roscoe C. Wilcox,	15,198 and
Florence Wilcox,	15,170

You will please take notice that the Master's reports therein are in draft and may be inspected in the Master's office at any time after 2 P. M. on Monday, December 22, 1913. Copies of the reports may be obtained, if desired, from the Masters's reporter, E. W. Lehner.

The report in the case against Edward L. Cooksey is a general report, covering all matters common to the entire litigation. The other reports contain only details special to the various entries, together with findings therein. In brief, the Master's conclusions on the question of fraud in the entries vary with different entries. The defense of innocent purchase is decided in favor of the defendants, and the defense of the statute of limitation in favor of the Government. The main report, in the Cooksey case, is incomplete in that there will be added to it certain schedules of dates, of Land Office proceedings, etc., collated from the evidence, which schedules will be supplied in [196] the near future.

The parties may file with the Master objections to the reports on or before January 21, 1914. *The time thus given will not be extended.* With the objections the parties may submit, if they desire, suggestions of amendment where the Master has made obvious error, or where findings in favor of either party are not deemed sufficiently stated. Suggestions of amendment must accord with the Master's view, and must not be confused with objections.

Under the rules of the Federal Courts in equity objections taken before the Master, like exceptions to the report filed with the Court, must be specific, and, like a special demurrer, must indicate clearly wherein the error has been made. Objections need not be made nor exceptions filed as to conclusions of law. Under the practice of the courts no exception filed with the Court will ordinarily be noticed unless it is first called to the attention of the Master. This is the office of objections. Since this practically amounts to duplicating in the form of exceptions the objections first filed with the Master, it is not unusual for parties to file a stipulation that the objections taken before the Master and by him returned, as these will be, may stand as exceptions to the report.

The parties will be heard briefly in oral argument in support of the objection, if desired, upon notification given to the Master at the time of filing.

The reports in others of the 79 cases under submission will be announced in draft within the near future and time given within which objections are to be filed. The Master would suggest to counsel that their labors in preparing the objections will be shortened if a similar plan is adopted as that disclosed in these reports; namely, complete objections in the Cooksey case, and in the other cases objections special to those cases, together with an incorporation by reference to the objections filed in the Cooksey case.

Yours very truly,

_____,

Master in Chancery. [197]

December 29, 1913.

Benj. L. McKinley, Esq.,
United States Attorney,
Earl H. Pier, Esq.,
Asst. U. S. Attorney,
Charles A. Shurtleff, Esq.,
J. G. De Forest, Esq.,
Attorneys for Defendants,
San Francisco, Cal.

Dear Sirs:

In the causes in this Court heretofore consolidated for trial between the United States and the Curtis, Collins & Holbrook Company, the Master's reports in the following cases described by the names of entrymen defendants and numbers, are in draft and may be inspected in the Master's office at any time after 2 P. M. on Monday, December 29, 1913, namely:

Henrietta Tuman,	No. 15,099
LeRoy Benner,	No. 15,100
B. F. Wardlow,	No. 15,102
George A. Hall,	No. 15,103
Della Hall,	No. 15,104
Mabel Chamberlin,	No. 15,191
R. J. Mitchell,	No. 15,105
Arthur W. Savercool,	No. 15,172
Willis Savercool,	No. 15,106
James Savercool,	No. 15,107
Lillian Savercool,	No. 15,194
John Zuschlag,	No. 15,200
Martha L. Zuschlag,	No. 15,117
Emma L. Kelley,	No. 15,179
Mamie Ogle,	No. 15,136

Jacob G. Hensley,	No. 15,111
Sylvester G. Eastman,	No. 15,173
Joseph Ogle,	No. 15,110
Joseph I. Kelley,	No. 15,178

Objections to these reports together with suggestions of amendment, if any, must be filed on or before January 28, 1914.

Yours very truly,

_____,

Standing Master in Chancery. [198]

Jan. 6, 1914.

John W. Preston, Esq.,
United States Attorney,
Earl H. Pier, Esq.,
Asst. U. S. Attorney,
Charles A. Shurtleff, Esq.,
John G. De Forest, Esq.,
Attorneys for Defendants,
San Francisco, Cal.

Dear Sirs:

In the causes in this Court heretofore consolidated for trial between the United States and Curtis, Collins & Holbrook Company, and others, the Master's Reports in the following cases, described by the names of the entrymen defendants, and numbers of the cases, are in draft and may be inspected in the Master's office, namely:

Pliny P. Hudson,	No. 15,153
John W. Aid,	15,195
Jacob S. Aid,	15,108
James D. Aid,	15,196
Thomas L. Aid,	15,109

James W. Rhodes,	15,138
Elijah Taylor,	15,112
Robert Charles Taylor,	15,113
Charles Moore,	15,114
Charles H. Butler,	15,115
John L. Gray,	15,174
James T. Taylor,	15,154
William J. Gardenhire,	15,189
George D. Gardenhire,	15,187
Charles J. Monroe,	15,188
Henry M. Smith,	15,197
Robert McCloud Cameron,	15,176
Ingvard M. Christensen,	15,175
John Vanornum,	15,181
M. Jackson Self,	15,180
James D. Baker,	15,163
Mayme H. Baker,	15,164
Margaret J. Baker,	15,186
John H. Kelly,	15,171
Frank E. Kruger,	15,193
Della P. Kelly,	15,192
George M. Cooksey,	15,116
Henry D. Morley,	15,135
Ira T. Johnson,	15,177
Harry E. Johnson,	15,119
Henry Clay White,	15,118
Charles J. Allen,	15,190
Carrie M. Allen,	15,168
Ellen Spring,	15,167

Objections to these Reports together with suggestions of amendment, if any, must be filed on or before February 3, 1914.

Yours truly,

_____,

Standing Master in Chancery. [199]

January 10, 1914.

John W. Preston, Esq.,
United States Attorney,
Earl H. Pier, Esq.,
Asst. U. S. Attorney,
Charles A. Shurtleff, Esq.,
John G. De Forest, Esq.,
Attorneys for Defendants,
San Francisco, Cal.

Dear Sirs:

In the causes in this Court heretofore consolidated for trial between the United States and the Curtis, Collins & Holbrook Company, and others, the Master's Reports in the following cases, described by the names of the entrymen defendants, and numbers of the cases, are in draft and may be inspected in the Master's office at any time after 2 P. M. on Monday, January 12, 1914, namely:

Mollie Scott,	No. 15,155
Fred Scott,	15,156
Carrie L. Ross,	15,202
Herman Gartelman,	15,159
Edward Brase,	15,157
Jack Perini,	15,158

Objections to these reports together with suggestions of amendment, if any, must be filed on or before February 9, 1914.

As regards these cases and all other cases which have been reported in draft the respective counsel will serve copies of their objections and suggestions, if any, upon opposing counsel before filing with the Master.

Yours very truly,

_____,

Standing Master in Chancery. [200]

January 13, 1914.

John W. Preston, Esq.,
United States Attorney,
Earl H. Pier, Esq.,
Asst. U. S. Attorney,
Charles A. Shurtleff, Esq.,
John G. De Forest, Esq.,
Attorneys for Defendants.
San Francisco, Cal.

Dear Sirs:

You will have observed that in the Master's draft report in United States vs. Edward L. Cooksey certain omissions were made, chiefly references to pages of the report, citation of authorities and the like. These have been filled in by me as follows:

Page 66: After the words "supra page" insert: "50."

Page 79: After the word "Curtis, Collins & Holbrook Company" cancel the following: "and one other case, that of J. L. Gray, who deeded to Gregory."

Page 80: After "August 15, 1902" insert "Tr. 2801½."

Page 85: After the words: "Wigmore on Evidence" insert: "Sections 906, 1018, 745–7."

Page 106: After the word "imperiled" insert: "39 Cyc. 1772."

Page 107: Cancel the word "Citation," and insert: "Act of March 3, 1891, C. 559, 26 Stat. 1093."

Page 114: After "supra P." insert: "45."

Page 123: Cancel the word "November" and insert: "December."

Page 125: After the word "Perini's" insert: "and," and cut out the words "and Gartelman's" in the next line.

Page 126: Second paragraph; cut out the words "the entry of J. L. Gray" and insert in the next line after the words "Carrie L. Ross" the words "Fred Scott."

Page 127: Line 4, insert after the word "of" the words: "Fred Scott and."
After "supra" insert: "p. 79."

It will also be noted that in the reports announced in my letter of December 22, 1913, other than the report in the case against Edward L. Cooksey, reference to various subdivisions of the Cooksey report incorporated in the other reports was left blank. This should be filled in with the proper pages as disclosed in all subsequent reports announced by me.

In the same letter of December 22d I announced that certain schedules and tabulations would be annexed to the Cooksey report. These are in prepara-

tion, and when completed and compared will be handed to you. They are simply compilations from the facts already found and announced.

Yours very truly,

_____,

Standing Master in Chancery. [201]

January 19, 1914.

John W. Preston, Esq.,
United States Attorney,
Earl H. Pier, Esq.,
Asst. U. S. Attorney,
Charles A. Shurtleff, Esq.,
John G. De Forest, Esq.,
Attorneys for Defendants.
San Francisco, California.

Dear Sirs:

I have completed and annexed to the Cooksey report certain schedules and tabulations of dates, etc., referred to in my letter of December 22, 1913. The tabulations may be inspected in my office and copies obtained from the Master's Reporter, if desired. These tabulations are compiled from the reports already announced, and contain nothing new. If any error has been made, the report from which the matter is compiled will govern; consequently no objections need be taken to these tables, but I should be glad to be informed of any variance from the original reports that may have inadvertently been made.

Yours truly,

_____,

Standing Master in Chancery. [202]

February 13, 1914.

John W. Preston, Esq.,
United States Attorney,
Earl H. Pier, Esq.,
Asst. U. S. Attorney,
Charles A. Shurtleff, Esq.,
John G. De Forest, Esq.,
Solicitors for Certain Defendants.
San Francisco, California.

Dear Sirs:

In the consolidated cause of United States vs. Curtis, Collins & Holbrook Company et al.:

I call counsel's attention to certain oversights in the filing of objections.

The objections of Curtis, Collins & Holbrook Company in case No. 15,108, Jacob S. Aid, and No. 15,109, Thomas L. Aid, are not signed by the solicitors as required by the rules.

In cases No. 15,180, M. J. Self, No. 15,163, J. D. Baker, No. 15,181, John Vanornum, No. 15,187, George D. Gardenhire, No. 15,188, Charles J. Monroe, and No. 15,189, W. J. Gardenhire, the objections on the part of the Government are not endorsed as required by the rules.

To avoid any possibility that objections filed have been mislaid or have not been noted by me, I will state the number of cases in which objections have been filed by the parties, as follows: By the United States: In all cases except the six which were due under the original order on February 9, 1914, which time was extended by me one day: by Curtis, Collins & Holbrook Company in 54 cases; by the in-

dividual entrymen in 17 cases. Counsel are desired to check this statement with their own files.

While I am informed that all objections have been served on opposing counsel, I note that a great many do not bear admission of service.

The Master does not expect to be on the Bench on to-morrow morning, Saturday, February 14, 1914. Counsel may call, therefore, [203] during that time to correct the inaccuracies noted. Any objections intended to be filed, which are not yet filed, may be presented to the Master before to-morrow noon.

Yours very truly,

_____,

Standing Master in Chancery.

[Endorsed]: Master's Reports. (1) On Final Hearing. (2) On Motion for Second Amendment of Bill. (3) Supplementary Report on Settlement of Objections. Filed Feb. 21, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [204]

In the District Court of the United States, in and for the Northern District of California, Second Division.

(Formerly)

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

IN EQUITY—No. 15,077.

UNITED STATES OF AMERICA,
Complainant,

vs.

EDWARD L. COOKSEY, CHARLES E. GREGORY, CURTIS, COLLINS & HOLBROOK COMPANY, a Corporation, et al.,
Defendants.

Objections and Exceptions to the Findings of Fact and Conclusions of Law of the Report of the Master in Chancery Filed in the Above-entitled Matter.

Now comes the complainant herein, by its attorney, John W. Preston, United States Attorney in and for the Northern District of California, and files herewith its objections and exceptions to the Master's report on the final hearing and for grounds of objection and objection specifies:

1. Complainant excepts to the finding and report of the Master (page 65) that the motion to file a second amendment to the bill of complaint should be denied.

2. Complainant excepts to the finding and re-

port of the Master (page 65) that the proposed second amendment is uncertain.

3. Complainant excepts to the finding and [205] report of the Master (page 65) that the said proposed second amendment does not conform to the proofs.

4. Complainant excepts to the finding and report of the Master (page 66) that the fraud alleged in the bill should be sure pleaded with more detail than in the original bill, or that said proposed second amendment would entitle the Government to no relief that it is not entitled to under paragraph VI of the original bill.

5. Complainant excepts to the finding and report of the Master (page 66) that said proposed second amendment is unnecessary.

6. Complainant excepts to the finding and report of the Master (page 67) that "During the course of the negotiations Tuman, at Holbrook's request, wired Holbrook that a named third party was ready to make the purchase on the same terms proposed. This telegram was false and intended merely as a means of accelerating the consummation of the bargain with Curtis and Collins," on the ground that it is immaterial in that it is not shown in the evidence that Curtis and Collins were made aware of this telegram.

7. Complainant excepts to the finding and report of the Master (page 69) that said contract provided "that the land was to go to the trustee, who, when directed by Holbrook that he had been

paid, was to deed the lieu lands to Curtis and Collins."

8. Complainant excepts to the finding and report of the Master (page 70) "that the corporation was to acquire title to the lands through Curtis and Collins." [206]

9. Complainant excepts to the finding and report of the Master (page 70) that "in effect it was a transaction of purchase and sale between Holbrook as vendor and Curtis and Collins as vendee."

10. Complainant excepts to the finding and report of the Master (page 70) that "in this transaction the parties have been seen to be dealing at arm's-length."

11. Complainant excepts to the finding and report of the Master (page 70) in that said report fails to take cognizance of the fact testified to by T. D. Collins (page 2023) that he insisted that Charles H. Holbrook take stock in said corporation and have an interest in said business as he wanted him to be associated with the business so that there would be three instead of two in the firm and instead of the firm being "Curtis and Collins," it should be "Curtis, Collins and Holbrook."

12. Complainant excepts to the finding and report of the Master (page 71) that the relation between Tuman and Holbrook of equal partnership, "was not known as such by the other parties," on the ground that the same is not sustained by the evidence in that it appears from the testimony of E. S. Collins that during the early operations in

Plumas County he learned of the relationship between Holbrook and Tuman.

13. Complainant excepts to the finding and report of the Master (page 71) that, "It must be perfectly apparent that as regards all these lands acquired by the use of forest reserve script the relationship between Curtis and Collins and the defendant company, their assignee, on the one hand, and Holbrook and Tuman on the [207] other, was in no sense that of partners or of principal and agent" in that the same is not sustained by the evidence and that the same is not a proper construction of the contract referred to as Exhibit "B" establishing the relationship between the various parties.

14. Complainant excepts to the finding and report of the Master (page 71) that "It is perfectly clear that Curtis and Collins and the company on the one hand and Holbrook and Tuman on the other, the latter undisclosed, dealt at arm's-length as adversary parties in any transaction of purchase and sale," in that it is not supported by the evidence and is contrary to the evidence as shown by the various contracts drawn between the parties and introduced in evidence and the testimony of T. D. Collins, E. S. Collins, J. G. Curtis, D. G. Curtis, Geo. E. Tuman, Chas. E. Holbrook, Jr., and Chas. A. Shurtleff.

15. Complainant excepts to the finding and report of the Master (bottom page 71, top page 72) that "Collins stated that they would be willing to take those lands if the titles were absolutely

good," and "E. S. Collins assented to the acquiring of timber and stone entries if everything about the entry was fair, above-board, and legal," and "The details were not discussed and undoubtedly Collins and Curtis not only desired that the title should be acquired in a legal manner, but had every confidence in Holbrook that they would be so acquired," on the ground that the same is not supported by the evidence and that it fails to take into consideration the circumstances under which said conversations were had and the total disregard of proper business safeguards in allowing the actions of Holbrook in carrying out the acquiring of the timber and stone [208] lands as is evidenced by the testimony given by D. G. Curtis, J. G. Curtis, T. D. Collins, E. S. Collins, G. E. Tuman, Chas. H. Holbrook, Jr., Chas. E. Gregory and Chas. A. Shurtleff.

16. Complainant excepts to the finding and report of the Master (page 72) that "There was difficulty in obtaining scrip without restrictions available for use and to obtain it promptly so that the lands cruised and listed as desirable for purchase could be obtained promptly before they were taken up by others," on the ground that the same is not supported by the evidence and that, as appears from the testimony of Chester Hovey and Chas. Swayze, scrip was easily obtainable at that time.

17. Complainant excepts to the finding and report of the Master (page 73) that "the plan of operations devised by Holbrook and Tuman to acquire these lands by timber and stone entries was

intended by them to conform to the law," in that the testimony of all the entrymen and various witnesses tends to establish that the system devised by them was a system of procuring a wholesale entry of the lands which they desired, by dummy entrymen in reckless disregard of the law, and further, at the time they carried out the system as testified to by G. E. Tuman, both he and Holbrook believed that any agreement made prior to final proof would be fatal and in every instance, with the exception of two cases, they advanced money to the entrymen to make their final proof, with the assurance that ultimately the land would be conveyed to whomever Holbrook and Tuman might desire. [209]

18. Complainant excepts to the finding and report of the Master (page 73) that "There is no evidence at all that the Curtises or Collinses or the Curtis, Collins and Holbrook Company, after its organization, supplied Holbrook and Tuman or either of them or anyone else with money to acquire timber and stone entries, as was done by them in the case of the scrip. The money used was that which represented Holbrook's and Tuman's profit on the scrip sales "in that the same does not take into consideration the fact that to carry on these operations would require close on to $100,000, and that under the terms of the contract Holbrook did not receive in cash over $10,000 as profits out of the same with which to carry on said operations, and in that the Master fails to take into consideration the fact that portions of the money used in the acquiring of the lands herein were deposited in the

bank of California in the name of Collins and Holbrook and in this connection complainant specifically excepts to the ruling of the Master during the taking of testimony refusing to admit the account of Collins and Holbrook with the Bank of California during the years 1902 and 1903 and 1904 in evidence for the purpose of establishing that Collins had an interest in the fund.

19. Complainant excepts to the finding and report of the Master (page 73) giving weight to the testimony of Tuman that "There was at all times available for this purpose, the fund of at least $30,000 in cash," in that, as Tuman testifies, Holbrook had charge of the cash during the whole of these transactions and as he needed the money the same was furnished him by Holbrook for carrying on the operations. [210]

20. Complainant excepts to the finding and report of the Master (page 73) that "These notes on the 42,000 acre contract would amount to $26,700, which could have been discounted at once. Undoubtedly also Holbrook could have made a loan on the contract itself or on the stock of the corporation, after it was organized on August 15, 1902, and its stock issued against the scrip lands which they began to acquire in September, 1902," in that there is no evidence whatever to support this assumption and further, the contract relating to the scrip lands was not consummated so as to give Holbrook control of any money or any assets upon which to borrow money prior to the 15th day of August, 1902, and the evidence shows that a

great many entries had been made under the supervision of Holbrook and Tuman and final proof had with money advanced by Holbrook and Tuman prior to said date and that a great many more within a few days thereafter.

21. Complainant excepts to the finding and report of the Master (page 73) that "All this money was handled by Holbrook and kept in his name," in that the same is not supported by the evidence in that it appears that part of the money used in the acquiring of the lands was kept in the name of Collins and Holbrook in the Bank of California.

22. Complainant excepts to the finding and report of the Master (page 74) that, "There existed a very well-defined rumor that timber and stone entries prior to this time could be sold for $750 a claim," in that the same is not supported by the testimony, the testimony being that a profit of $75 a claim could be obtained. [211]

23. Complainant excepts to the finding and report of the Master (page 75) that "Undoubtedly Heppe was advised that no agreement should be made," in that the same is not supported by the evidence in that it fails to take into consideration the plan of operations which Heppe carried out which would have been incompatible with the idea that he was to make no agreements.

24. Complainant excepts to the finding and report of the Master (page 75) that "Generally nothing more was said," in that it fails to take into consideration the evidence of the entrymen in most cases that they would accept Heppe's proposition

or that they were willing to undertake such a plan of acquiring timber land and getting $100 for doing so, also that Heppe was to show them the land which they were to take up in order to obtain the $100.

25. Complainant excepts to the finding and report of the Master (page 75) that, "Tuman told Remick . . . to be careful not to make any contracts," in that it fails to take into consideration the fact that the first two entrymen that Remick located were located as the result of an express contract between the parties and it is improbable that if he had been given such instructions he would have violated the same in the first act that he did under them.

26. Complainant excepts to the finding and report of the Master (page 76) that, "He (Tuman) said nothing to Remick about the $100 net profit," in that it fails to take into consideration the assurance with which Remick made his propositions to Huntington and Cooksey of the $100 profit and the regularity and the assurance with which his method of proceeding operated, so that nearly all other entrymen taking land through him received [212] $100 profit over and above their expenses of taking up the land.

27. Complainant excepts to the finding and report of the Master (page 76) that, "He had no conversation with any of the locators to whom he gave descriptions of lands to the effect that their lands could be sold or that they would make at least $100 profit, excepting John Huntington and Edward

Cooksey," in that it fails to take into consideration the fact that with very few exceptions every locator to whom he furnished descriptions of lands disposed of the land for a profit of about $100, and the testimony of Roy Stark, Arthur W. Savercool and John Zuschlag and others bears evidence that the conversations relating to this subject must have been had prior to the taking-up of the land, and further that it fails to take into consideration the fact that Remick had known all these entrymen for many years and was a neighbor of most of them and had discussed with them recently more or less the circumstances of the case and that his testimony was given subsequent to that of any of the entrymen and that Remick is now in the employ of the Curtis, Collins and Holbrook Co. and has been for a number of years past and has been instrumental in producing evidence in behalf of the defendants.

28. Complainant excepts to the finding and report of the Master (page 76) that "These were the only two that he had anything to do with," in that it fails to take into consideration the fact that he had located Pliny P. Hudson upon his land prior to the time that he located John Huntington and Edward Cooksey.

29. Complainant excepts to the finding and report of the Master (page 76) that "After that it [213] appears that entryman came to him and asked for descriptions and he did not find it necessary to do more than furnish the descriptions, all of them apparently relying upon general rumor as

to what could be accomplished if the land were sold," in that the same is not supported by the evidence and that in each case the so-called general rumor is directly traceable to Remick, as is shown by the testimony of John Zuschlag, Chas. Huntington, Geo. Hall, all three of the Stark entrymen, John Aid, and three Savercools, Geo. Tanner, Jas. Taylor and others.

29a. Complainant excepts to the finding and report of the Master (page 77) that "In some cases he had to pay prices in excess of $100 profit to the entrymen as high as $1,600 gross," in that while it is true in a few instances he had to pay a profit to the entryman in excess of $100, that the occasions of paying $1,600 gross for an entry was exceptional and that the rule in a large majority of the cases was $100 to $125 profit. The only lands for which $1,600 a claim was paid, were the entries of Brase, Perini and possibly Carrie Ross.

30. Complainant excepts to the finding and report of the Master (bottom of page 76, top of page 77) that sometimes "The note ran in favor of Elam and very often in favor of S. C. Lewis, whose name was used for the purpose," in that the same does not contain a finding of the purpose for which the notes were taken when taken in the name of Elam and Lewis and no finding that notes were never taken in the name of Holbrook or Tuman and that the purpose for which said notes were taken in the names of other parties is not found by the Master. [214]

31. Complainant excepts to so much of the find-

ing of the Master as relates to the returning of the money, that "Lawrence did not make final proof but kept the money except for a part which he subsequently returned," as the same is not supported by the evidence. In behalf Lawrence and Geo. E. Tuman, who had furnished the money, testified that Lawrence did not return the same and the testimony of Chas. H. Holbrook, Jr., on the subject on this point is incredible in that it bears on its face that to accomplish what the said Holbrook claims to have accomplished, he had to commit blackmail and extortion and had he accomplished what he claims to have accomplished, he would have gone further and have sued upon the note that he claims to have obtained to have recovered the further amount which he claims to be due him.

32. Complainant excepts to the finding and report of the Master (page 79) that "I am not able to give this fact of the assembling of the lands in Gregory any special significance as regards the question of fraud in these entries," in that the same is not supported by the evidence in that all the evidence tends to show that said lands were taken in the name of Gregory for the purpose of concealment and for the purpose of assisting Holbrook and Tuman and the corporation to conceal the fraud and that it does not take into consideration the fact that Tuman tells one story upon this point and that Holbrook tells another story upon this point; that the answer of the defendants failed to disclose that they were purchasing the lands from Holbrook and as a matter of fact would lead

one to believe at all times that the company was purchasing the lands from Gregory; [215] that when Tuman was asked before the trial what was the reason for taking the deeds in Gregory's name, he refused to give any explanation, stating that he preferred to keep that matter to himself until called upon to testify on the stand; further, that Gregory being unconnected in any business way with Holbrook or Tuman and not being known in the vicinity to be operating in timber lands, the deed to him would not bear the same significance to a person making an investigation as it would to Holbrook or Tuman who were persons well known in the field and known to be operating in timber lands and in a great many cases the entrymen did not know the name of the person to whom he conveyed the land and it would therefore be impossible to locate the said Gregory in those cases, and further it fails to take into consideration the fact that the deeds from the entrymen to Gregory were kept off the records until after patent issued, although the deeds from Gregory to the corporation had been executed for a period of over a year prior to the issuance of patent; and further, it fails to take into consideration the fact that in the lending of the money Tuman and Holbrook did not use their own names to lend the money in, but used the name of Elam in a few instances, but in the majority of cases used the name of Lewis, who was also a person unknown in the community. Also it fails to take into consideration the manner in which the deeds of most of the entrymen were executed, the general plan

being to take the entryman in before a notary where the deed had already been prepared, telling him to sign the papers and paying his $100.

33. Complainant excepts to the finding and report of the Master (page 80) that "little more need be [216] said as to the facts common to all entries," in that the discussion preceding thereto fails to take cognizance of the fact that the publication which was required by law was not paid by the entryman nor was there any discussion with the entryman as to the payment of the same and generally that feature of the entry was not taken account of by the entryman; that it fails to discuss the fact that without any understanding or without any discussion whatsoever between the entryman and the locator, between the making of his (entryman's) initial sworn statement by which he made his original application to purchase the land and the time he made his final proof, Tuman's agent furnished money to make final proof and the money, with the exception of two cases only, to wit, that of the two Wilcoxes, was always at Susanville waiting for the entryman at the time he made final proof. Also it fails to take into consideration the fact that while Remick and Heppe and other locators were to get a $25 location fee, that this location fee was never mentioned to the entryman and he was being shown the lands and valuable information was being furnished him as to good timber land and that no discussion whatsoever was had as to compensation for these services and this information being paid by the entryman to anyone and that

the entryman's sole purpose in taking up the land was not the acquiring of the land, but the obtaining of the $100 profit and that it further fails to take into consideration the fact that Edward Cooksey and John Huntington did not tell of the deal which they had had with Remick, so that the general rumor that Remick was locating people could not be traceable to this first deal with Cooksey and Huntington and the [217] information must have come to the various entrymen direct from Remick, or from Heppe or Aid or some other agent of Tuman, to the entrymen, that Remick was doing the locating if they wished to make $100 profit in taking up the land.

34. Complainant excepts to the finding and report of the Master (page 80), that "The transfer of the lands involved in these suits was actively concluded between D. G. Curtis, representing Curtis and Collins, the purchasers, and Holbrook in his own behalf and that of Tuman, the latter being undisclosed," in this, that the only testimony on the subject of the actual payment of the money to Holbrook is that of D. G. Curtis in which he states that he paid for the same with checks of the company and that all the witnesses testified to the purchase of the land by the company from Mr. Holbrook and that the only evidence that it was Collins and Holbrook who might have been buying the lands, is contained in the leading and suggested questions of counsel for the defendant. And further excepts to this finding on the ground that the evidence outside of the bald statement of the vari-

ous witnesses on behalf of the defendant that the company purchased the land from Holbrook tends to show and establish that Holbrook was not selling the land to the company as an independent operator, but was really the agent of the company in the purchasing of the lands and that at all times he was purchasing the lands for the company and that at the time the transaction was taking place, it was so considered by all the stockholders of the corporation, as is evidenced by the testimony of D. G. Curtis, G. E. Tuman, J. G. Curtis, E. S. Collins, and Chas. Holbrook, Jr., in that they discussed the method of acquiring the land by buying entries made by timber and stone entrymen, [218] that they were all suspicious of that method of acquiring timber land titles, that they actually did not believe that a solid body of timber land could be acquired by this means legally and successfully, that a solid body of timber land was actually acquired by this method, and that the corporation and none of its officers ever in any way undertook to check up Mr. Holbrook to see that he had deeds from the entrymen for the land which the company got through the conveyances from Mr. Gregory, and in that it further fails to take into consideration the fact that Holbrook had control of the finances of the corporation and all of its affairs and ran its business solely, from the time of its inception until he left the company, with merely the acquiescence of all parties that he might pay for said land as high as $10 an acre and that said acquiescence was obtained through the agency, efforts and influence of D. G.

Curtis, who was to be paid a commission on the purchase price of the lands, and further that at the time the timber and stone entries were purchased Mr. E. S. Collins knew of the relations between Holbrook and Tuman, and Tuman was not an undisclosed party to the transaction. (Note testimony of E. S. Collins.)

35. Complainant excepts to the finding and report of the Master (page 80) that "The money paid for these timber and stone lands was paid by Curtis and Collins and not by the company," in that the distinction made by the Master is not made by the evidence and that all parties, at the time the transaction was taking place, were considering that Collins and Curtis were [219] putting up the money and Holbrook was putting up his time and the company was getting the title to the land and Curtis and Collins were getting stock at par for the amounts of money which they advances and Holbrook was getting stock and money for the lands turned in.

36. Complainant excepts to the finding and report of the Master (page 80), "This is in analogy as to the contract requirements of scrip lands, which, as has been seen, (*supra,* p. 70), contemplated the securing of lands by other means if necessary than that of using scrip," in this, that the evidence shows that when they came to acquiring the land under the Timber and Stone Act, the defendant corporation and T. D. Collins, E. S. Collins, D. G. Curtis, J. G. Curtis, C. H. Holbrook, Jr. and Sr., and Geo. E. Tuman, went into the

transaction relying entirely upon each other's oral word, without the scratch of a pen to evidence the transaction in any way and without having the details of the transaction in any way checked up by an attorney. In short, all the methods of precaution that were taken by the various parties in acquiring the land by the so-called scrip method, which was legal, were abandoned when it came to acquiring the land under the Timber and Stone Act, which was illegal.

37. Complainant excepts to the finding and report of the Master (page 80), that "A transcript of the account (Curtis, Collins and Holbrook Co. with the Bank of California) was produced and not introduced by the Government. The contention of the United States was that Holbrook was paid by the company. I must assume, therefore, that the account showed only what other witnesses testified was the fact (Tr. 3072), namely, that [220] except where the company bought direct, its expenditures were only for trivial matters and not involving the purchase of these timber and stone entries," in that the same is not supported by the evidence in that the only person who testified to any money being paid to Chas. H. Holbrook, Sr., was D. G. Curtis, in which he states that he signed the check paying for these lands and that it was the Curtis, Collins and Holbrook check. The testimony of Holbrook, Jr., is to the effect that he knows nothing of the manner in which his father received pay for the lands. The burden being upon the defendant, who was a *bona fide* purchaser, the

Government was entitled to rely on the testimony of the defendant's witnesses, D. G. Curtis, and if there was anything in the account which tended to offset Mr. Curtis's testimony, the burden was not upon the Government to introduce the evidence but upon the defense and no adverse assumption should be made to the Government for failure to introduce this record in view of the fact that before that time the Government had offered the account of Collins and Holbrook with the Bank of California, which was refused admission, in evidence and in view of the fact that the personal account of Chas. Holbrook, Sr., was destroyed by the fire of 1906 and in view of the fact that the defense had an equal opportunity to introduce this account in evidence and failed to do so.

38. Complainant excepts to the finding and report of the Master (page 81) that "these resolutions recited the proposal by T. D. Collins and J. D. Curtis, in writing, to sell the lands in question to the company in return for stock issued to them at par and the acceptance of these proposals by the company," in that, the same does not take into consideration the testimony [221] of T. D. Collins, J. G. Curtis, D. G. Curtis, E. S. Collins and G. E. Tuman, to the effect that so far as the Curtises and the Collinses were concerned, it was purely a question of putting up the money and receiving the stock to the corporation; the details of getting the title into the corporation were none of their concern and the evidence does not in any way show that either Collins or Curtis considered that they

were buying the timber lands themselves but that they were putting up the money, getting stock for the same and that the corporation was getting the timber land.

39. Complainant excepts to the finding and report of the Master (page 82) "Who was first to advertise generally the existence of a market for timber and stone entries in Plumas County, either by direct suggestion, through agents, or by the admission of neighborhood gossip," in that the same would indicate that there were two methods of operation on the part of the operators Holbrook and Tuman, whereas the evidence in regard to each entryman generally establishes the fact that the second is always traceable to the first, namely, that the neighborhood gossip could be directly traced to suggestions made by the agents of Holbrook and Tuman. To substantiate this exception, complainant refers to the testimony of all the entrymen in the consolidated cases.

40. Complainant excepts to the finding and report of the Master (page 82) that "He not only refused to make agreements in several cases where the entrymen desired it, but he instructed men who helped him induce the location, like Heppe and Remick, likewise to avoid making promises and agreements," in that the testimony [222] to the effect that Tuman gave such instructions, found in the testimony of Heppe, Remick, Aid and Tuman, is very unsatisfactory on the point and it seems improbable and incredible to believe that Heppe and Remick and Aid carried on such bold

operations in making agreements openly in the way they did, as evidenced by the testimony of the various entrymen, in the face of such instructions.

41. Complainant excepts to the finding and report of the Master (bottom of page 82), "I have said it would have been foolish for Tuman to have made agreements," in that the argument which follows in the remainder of said paragraph establishes that the entrymen were practically dummies and therefore would come within the ruling that it would be construed that the dummy entrymen had made a contract before he entered his land.

41a. Complainant excepts to the finding and report of the Master (page 83) that "What he (the entryman) did after entry is really not particularly material in view of the Williamson decision," in that said finding does not take into consideration the fact that the entryman in a large majority of the cases was advanced money without any negotiations between him and the agents of Tuman after he had made his entry and that the deal was carried out from the time of entry to the delivery of the deeds and the receiving of the profit by the entryman with practically no negotiations whatever.

42. Complainant excepts to the finding and report of the Master (page 83) that "His money (referring to the money loaned to the entrymen) was fairly secure since the entryman would have the land and would either have to sell to him at the profit Tuman offered of $100, or stand suit with the land in the background as security [223] for the recovery of the loan, since in two cases, that of Frank McManus

and Will Lawrence, as shown by the testimony of Tuman and Lawrence, Lawrence did not get the land, but kept the $400, and Tuman did not dare to proceed against him, and in the case of Frank McManus who received the land but did not deed the same over nor repay the money advanced and he was never sued in connection with the transaction.

43. Complainant excepts to the finding and report of the Master (page 83), "The chances Tuman was taking when loaning money was therefore not great," in that the same is not borne out by the evidence as showing that under the methods pursued by Frank McManus as detailed by Tuman, and by Will Lawrence, as detailed by himself and Tuman, they could have in one case, after getting title, refused to deliver title to Tuman at all and in the other case not get the land but keep the $400 advanced, according to the method of Lawrence, and in either case Tuman had no way which he dared undertake, except the blackmail system as suggested in the testimony of Chas. Holbrook, Jr., of becoming reimbursed for the money laid out.

44. Complainant excepts to the finding and report of the Master (page 83) that "At the same time there were several cases where he never got the land nor the money, but doubtless did not think it worth while for the amount involved, to sue for its recovery," in that, so for as said finding relates to the reason for his not suing for the recovery of the money there is no evidence to sustain said finding in the record, and the reason assigned is highly incredible in view of the fact that in each case Tuman was out over $500. [224]

45. Complainant excepts to the finding and report of the Master (page 83) that "There were a number of cases where the entrymen realizing that they were apparently free to barter, did so, and forced Tuman to come to their terms," in so far as the same relates to the reason assigned for the entrymen forcing Tuman to come to their terms, in that in most cases where Tuman was compelled to pay the entrymen more than the $100 or $125 involved in the action, the entrymen realized that they had $500 of Tuman's money, and that in order for him to get the same back, he would have to pay them what they asked.

46. Complainant excepts to the finding and report of the Master (top of page 84) that "Another thing to be kept in mind is that the issue is to determine not whether what Tuman did was fraudulent, but whether what each entryman did was fraudulent, in that he had bound himself by an agreement," in that it fails to take into consideration the general scheme under which Tuman was operating and under which these lands were taken up, in that it ignors the fact that in the taking up of these lands the entryman did not initiate the proceedings of himself, but was started into the transaction through the influence and representation of Tuman through his various agents, and that if Tuman's system of taking up the land was fraudulent, as the evidence in all the entries undoubtedly establishes, and the entryman falls in with the system of operations of Tuman and takes up the land according to that system, his entry must also be adjudged fraudulent. [225]

EXCEPTIONS ON COMMENTS ABOUT WITNESSES.

47. Complainant excepts to the finding and report of the Master (page 87) that "As to the testimony of the two Curtises, the two Collinses and Mr. Shurtleff, and of other witnesses called for the defense, they are all men of the highest character and undoubtedly truthful," in that the same would give to the testimony of all the witnesses called for the defense the weight of being an accurate statement of the facts as they occurred, whereas the testimony of the witnesses T. D. Collins, E. S. Collins, D. G. Curtis, and Chas. H. Holbrook, Jr., bears evidence of striking inconsistencies of action and reliability. In the case of Chas. H. Holbrook, Jr., the fact that he would testify to an attempt at blackmail of William Lawrence in order to recover the sum of $400 of itself is sufficient to make this testimony dubious, taken together with the fact that he was too ready to testify to facts of which he had no knowledge, as, for instance, his testifying as to an interview between William Singer of the Railroad Company, Chas. H. Holbrook, Sr., Mr. Swayze, E. S. Collins and Mr. Shurtleff, and perhaps D. G. Curtis, and the results of said interview, whereas it developed on the cross-examination that he was not present at the interview at all. Again, he testifies that his father was paid for the lands by T. D. Collins and J. G. Curtis, and it develops on cross-examination that he does not know how his father was paid, that he never saw any of the money paid to his father and that his father never told him anything about being paid for

the reason that he was very closemouthed about his transactions; that the testimony of D. G. Curtis [226] shows him to be more or less unscrupulous in that when Holbrook wished to raise the price of the land sold to the company from $7.50 to $10, he engaged D. G. Curtis on a commission to be paid to him, to take the matter up with his father, J. G. Curtis, and T. D. Collins to get the increase in the price which should be allowed on the lands. That the testimony of R. S. Collins is highly incredible, in that it seems hardly possible that a person knowing as much as Mr. E. S. Collins claims to have known about the taking up of timber and stone land, and who was as particular as he was in his discussions with Holbrook to be certain that Holbrook would acquire lands in a legal manner and in a legal manner only, after such a careful discussion with Holbrook and his own conviction that a solid body of timber land could not be acquired legally under the Timber and Stone Act, should have left Holbrook to carry on the acquiring of the land in any way he saw fit and did not in any way undertake to check up Holbrook's operations or to see that Holbrook followed out legal lines in acquiring the land. That the testimony of T. D. Collins of itself shows him to be fanatical and hysterical in the various digressions taken in his testimony from the facts involved in the case, that his manner of testifying under cross-examination was more or less hysterical in that several times during the cross-examination the Government's attorney had to wait until he had recovered his composure from a weeping spell; that on cross-examina-

tion as to facts of material interest to the Government, he was unable to give any satisfactory details of his deal with Tuman in which he paid Tuman $150,000 for 200 shares of stock, or $750 a share, which he admits to be twice what he considered it to be worth, [227] since the commencement of these suits, and this is highly incredible, in view of the fact that the corporation had outstanding over 5,000 shares of stock and that the only stock which was not owned by T. D. Collins or E. S. Collins was the 200 shares of Tuman stock, particularly so in view of the fact that Tuman was the only man alive, with the exception of T. D. Collins, who know all the transactions; and further, that the finding is not supported by the evidence, in that no evidence whatever was introduced upon the question of the character of these witnesses.

EXCEPTIONS AS TO THE FINDING ON THE ENTRY OF EDWARD L. COOKSEY.

48. Complainant excepts to the finding and report of the Master (page 87) that "The defendant Edward L. Cooksey appeared as a witness for the Government," in that from said finding it would appear that Edward L. Cooksey was a favorable witness to the Government, whereas, as is shown by the record, he was a hostile witness to the Government and was called by the Government only because he was the only person known to the Government through whom the facts could be proved. The hostility of Cooksey appears from the fact that he filed an answer denying the fraud in the action and that he appeared by an attorney, J. C. De Forrest, who is an

associate of Chas. A. Shurtleff, the attorney for the defendant.

49. Complainant excepts to the finding and report of the Master (page 88) that "Cooksey paid out of his own funds all the ordinary land office fees and apparently the money necessary for publication of his notice in the paper," in that Cooksey's testimony is to [228] the effect that he does not remember whether or not he paid the publication fees; that he merely knows that he gave a statement that the publication fees were paid, and the testimony of John Huntington is to the effect that Ned Remick advanced him the money to pay the land office fees at the time they went over to file on the land.

50. Complainant excepts to the finding and report of the Master in that the Master fails to note the fact that between the last conversation before making his entry upon the land and the making of final proof, there were no negotiations in regard to a loan.

EXCEPTIONS TO THE MASTER'S REPORT OF ALL FACTS AND FINDINGS APPLICABLE TO ALL ENTRIES IN THE CONSOLIDATED CAUSE AS TO DEFENSE OF PURCHASER FOR VALUE WITHOUT NOTICE.

51. Complainant excepts to the finding and report of the Master (page 96) that "The facts of the cases at bar are on all-fours with the cases just quoted," in that D. G. Curtis, J. G. Curtis, T. D. Collins, E. S. Collins, G. E. Tuman and Chas. Holbrook, Jr., according to their testimony, all agree

on the fact that the titles on behalf of the company at the time of their being acquired were examined by no one and that the evidence shows that everything was left to Holbrook to determine whether or not the land was the character of land which the company desired, whether it had sufficient timber on it, whether the title was good or not, whether or not the title had actually been passed to the company, the paying for the land was under his own control and was paid on his and his son's statement and on no one's else.

52. Complainant excepts to the finding and report of the Master (page 96) that Curtis and Collins on the one hand and Holbrook on the other were plainly [229] seen to have been dealing at arm's-length in an adversary relation as vendee and vendor respectively," in that there is no evidence to support said finding in the record, and that it fails to take into consideration the fact that at the very outset of negotiations Mr. Collins insisted on Mr. Holbrook's becoming a member of the concern and taking a substantial interest therein and that thereafter Holbrook did take a substantial interest therein and increased his holdings in the company over and above the amount required by the original contract, that he had practically the exclusive charge of the affairs of the corporation, and that after the first transaction relating to the 42,000 acres of land acquired by scrip, the precautions ordinarily taken by men buying timber land were not followed, that no examination of titles was had, that Holbrook's word that he had the titles was taken, also his word was taken that the

deeds covered the quantity of land that he represented, that no examination of the lands was made by either Curtis or Collins or anyone else independent of Holbrook as to the quality and quantity and character of timber upon the lands or that the lands were timber in their character at all, and that in all their relations it is shown that Holbrook and Curtis and Collins understood each other perfectly and were all working to the common end of getting the title to the timber land that was at that time in the Government, into the corporation which was to be formed and which was actually formed for the purpose of holding the timber lands.

53. Complainant excepts to the finding and report of the Master (page 96) "That this case is not as strong as the Clark case," in this, among other things, that in the Clark case Clark had his own agent in the [230] field investigating the character of the timber lands and also had the title passed upon by reputable attorneys." In this case neither of these facts appear and they are the principal facts upon which the Court relies to determine if Clark was dealing at arm's-length with his vendor, Cobban. Furthermore, the facts upon which Judge Gilbert in the dissenting opinion in the Clark case in the Circuit Court of Appeals held that Clark should be charged with notice despite the fact that he had his agents in the field and had the titles examined by his own attorneys, appear in this case.

54. Complainant excepts to the finding and report of the Master (page 96) that "Curtis and Collins made no loans of money to acquire these timber and

stone lands as did Clark," in that the same is not supported by the evidence, in that it fails to consider the facts that the timber operations carried on by Holbrook were too extensive for him to be able to carry on on the small capital of $10,000 to which he was entitled and which was paid him under the terms of his first contract with Curtis and Collins, and further that part of his operations were carried on prior to the time of his receiving the money from Curtis and Collins under his first contract as he could not have received the money under the contract prior to the formation of the corporation, to wit, the 15th of August, 1902, and that Holbrook who had a personal account in the Bank of California, should have deposited the money with which he carried on these timber operations in the name of Collins and Holbrook in the Bank of California.

55. Complainant excepts to the finding and report of the Master (page 96) that the money was Holbrook's own, the profit of his previous dealings with the scrip lands in that the evidence establishes that [231] Holbrook did not have the money to carry on these extensive dealings, as the profits were not enough nor did he receive them in time to carry on these dealings.

56. Complainant excepts to the finding and report of the Master (page 97) giving to the testimony of T. D. Collins an amount of credence to which his testimony is not entitled. The testimony of these witnesses establishes that he is a vain, egotistical person who loves the dollar, pine and control of everything with which he comes in contact, and the fact

that he came from Pennsylvania to California in the middle of the winter to give his testimony in this matter when it could as easily have been taken by deposition shows that impending death did not weigh very heavily upon his conscience.

57. Complainant excepts to the finding and report of the Master (page 99) that "Tuman's testimony if thus intended to be influenced (by the purchase of his stock at twice its value) was not colored with any desire to assist the defendants," in that it fails to take into consideration the fact that Tuman's testimony in relation to the method of taking up timber lands was taken before very many of the entrymen had been examined, which testimony shows that Tuman during that examination as far as possible, protected himself and Holbrook in regard to the fraudulent entries but when it came to facts bearing on the question of *bona fide* purchaser, Tuman's testimony is not so frank and satisfactory, in that it is not clear or reasonable. For example, Tuman's explanation as to why the land was taken in the name of Gregory is not reasonable and as shown by the evidence, Mr. Tuman refused to give the reason to the Government's attorney when asked for that reason beforehand; also the testimony as to where [232] the money came from to take up this land, in this Tuman also gives a reason which is not borne out by the figures and this Tuman also refused to give to the Government before he was placed on the stand; also when Tuman settled with Holbrook, he settled with him for about one-half of what he was entitled to and this settlement was brought about

by the negotiations of T. D. Collins, and further what Tuman might have told as to T. D. Collins' knowledge of the fraud but for this transaction, cannot be known, and the fact remains that Tuman, the one man who should know of Collins' knowledge, was paid $150,000 for $75,000 worth of stock after the suit was brought, with absolutely no consideration of any kind in return.

58. Complainant excepts to the finding and report of the Master (page 99) that "It thus conclusively appears that except from conclusions that may follow from the facts that Holbrook was at the time that these titles were acquired, vice-president and manager of the Curtis, Collins and Holbrook Co., neither J. G. Curtis, nor T. D. Collins, nor the company itself, nor any of its officers, at any time had any actual knowledge or notice or any constructive notice arising from the facts that would put them on inquiry as to the fraud which the Government claims constitutes its equity," and to all the findings of fact preceding said finding and the discussions of the same beginning with page 96, continuously up to said findings, in that, said findings and discussions fail to take into consideration the fact that at the time Holbrook discussed with the Collinses and Curtises the advisability of purchasing timber and stone entrymen's claims, E. S. Collins knew that this method of acquiring timber lands had resulted in scandal in Washington and [233] that he was desirous that no scandal arise in connection with their lands, that he did not believe that a solid body of timber land could be obtained

legally under the Timber and Stone Act for if they were acquired legally someone else would buy out the entrymen, and that the company did, by this method, acquire a solid body of timber land, namely, the land which Remick had entrymen take up; and that other portions of the land taken up were also solid and adjoined land which the Curtis, Collins and Holbrook Co. had previously acquired by the scrip method; and the fact that in all their discussion, which was considerable, about acquiring land by the purchase of claims taken up under the Timber and Stone Act, they never discussed or consulted with their attorney, C. A. Shurtleff; and that after having decided upon the acquiring of land which had been taken up under the Timber and Stone Act, they should never have discussed the matter of the method of acquiring these timber claims again with Mr. Holbrook; that there was no investigation made of the titles in any way, either that the lands had ever been taken up under the Timber and Stone Act or that the entryman and his successor in interest had ever made deeds conveying the title to said lands to the company; and that the deeds from the entrymen were obtained so shortly after the date of making final proof, which of itself has been held to be not sufficient to charge notice, yet taken with all the other circumstances in this case is indicative either of actual knowledge of the fraud or a careful and assiduous effort on the part of the Curtises and Collinses not to learn of any fraud; and the fact that the slightest investigation of the titles [234] would have established,

accepting their own construction of the facts, if not that a fraud had been perpetrated upon the Government, that a fraud had been perpetrated upon them in that Holbrook was representing that he could not get the land for $7.50 per acre, whereas as a matter of fact, he was getting most of it for about $3.75 per acre, the discovery of which fraud would have meant Holbrook's ruination, and the fact that at the time they were purchasing these lands, they were not purchasing the legal title but were merely purchasing the equitable title which of itself should have made them more careful in regard to the title which they were acquiring; and the fact that the deeds from the entrymen to Gregory had not been recorded at the time the corporation got its title; and the fact that the corporation did not place its deeds from Gregory of record in a great many cases until after the institution of these suits, although at the time that Holbrook sold out it became definitely and certainly known that the corporation's deeds had not been placed of record; and the fact that the corporation did not have the deeds from the entrymen to Gregory recorded until after patent had issued in each case; and the fact that Tuman was paid $150,000 for his 200 shares of stock, which Collins did not believe to be worth more than half the price paid, the excuse being given for such price that he was afraid that a third person, Durphy, whom he did not wish to have in the corporation, was going to get the stock, which excuse becomes trivial when it is considered that over 5,000 shares of the stock had been issued and that T. D. Collins

and E. S. Collins owned all of said stock [235] with the exception of the 200 shares which Tuman owned, and had absolute control of the corporation and that said corporation was a holding company, holding nothing but timber land and was not operating any of its timber and that said stock was a source of expense and would be for years to come; and that Tuman's stock was purchased after the commencement of these suits; and that Tuman refused to state to the Government's attorney before he went on the stand to testify, why title was taken in the name of Gregory from the entrymen, and the source of the money which was used for operating in the field in acquiring these lands; and the fact that in Tuman's settlement with Holbrook he did not get more than half of what he was entitled to and that said contract of settlement was negotiated by T. D. Collins; and the fact that J. E. Remick, one of the locators was always in court and the peculiar changes in the testimony of A. W. Savercool and Warren Stark during the course of the trial taken in connection with James Savercool's and Willis Savercool's testimony, and the character of the testimony of James Stark, Burt Burris, and other witnesses, and the fact that in the purchase of some of the lands Holbrook had to pay $10 an acre for the land and that the corporation got the land for the price of $10 per acre; and the fact that Collins knew that on other lands than the land acquired under the Timber and Stone Act, and the land acquired under the contract, Exhibit "B" in evidence, Holbrook did not get any com-

missions from the company, although he negotiated the purchase for the company and was its purchasing agent therein; and the fact that Holbrook was the agent for the company to determine the character, [236] quantity and quality of the timber on the lands purchased and the fact that Holbrook was the agent of the company to determine that the titles were regular; and the fact that Holbrook was the agent of the company to determine that the title had been properly vested in the company; and the fact that Holbrook was the managing director and vice-president of the corporation and had complete charge of all the papers and records of said corporation, and that his signature was necessary on the corporation checks.

In support of the foregoing exception, we rely on the transcript of the testimony of T. D. Collins, E. S. Collins, J. G. Curtis, D. G. Curtis, Chas. H. Holbrook, Jr., G. E. Tuman, Chas. A. Shurtleff, J. E. Remick, John Heppe, Irving Moulton and the testimony of all the entrymen as showing the method of procedure in all cases in taking up the land and the testimony of Edward Brase, Burt Burris, F. G. Hall, A. A. Hall, Mrs. Cora Hall, Chas. E. Gregory, W. G. Lawrence, James Perini, Frank Sorsoli, Chas. E. Swayze and Arthur E. Vollmer. [237]

59. Complainant excepts to the finding and report of the Master (page 101) that "It therefore comes to this: That Tuman is charged with notice of whatever fraudulent agreement Remick or Heppe may have made with an entryman by a presumption in

the law of agency; that Holbrook likewise is charged with notice by reason of a presumption arising out of a relation of partnership between him and Tuman and that the corporation is charged with notice by reason of a presumption arising out of Holbrook's tenure of the office of vice-president of its board. It does not strike one as just that the defendant corporation should lose the property which it has purchased by reason of this pyrimiding of legal fiction," in that it fails to take into consideration the fact that Holbrook, during the time these lands were being acquired by the entrymen from the Government, was frequently in the field having consultations with Tuman and was handling the money which was advanced to the entrymen through Tuman for the purpose of paying the Government for the land taken up by the entrymen; that the general scheme of operation which was carried on by Tuman and Holbrook in Plumas County contemplated the fraudulent acquiring of the land by the entrymen and that, as Tuman states, Holbrook knew everything that he knew about the operations of acquiring the timber land, and therefore Holbrook's knowledge is more than that of a mere presumption of legal fiction but must be held to be actual knowledge.

60. Complainant excepts to the finding and report of the Master (page 101) that "When the company took [238] the conveyance from Gregory, though Holbrook was its vice-president at the time, he was at the same time in an adversary relation, he himself being the seller of the property. It is idle to say that he would not disclose any knowledge of

fraud in the titles which he is presumed to possess (contrary to the actual fact). Holbrook was not buying this land for the company. He was buying it from others and selling it to the company at a considerable profit above its cost to him, which profit he retained and was expected to retain. It cannot be assumed that he told or would tell the company of any defect in its title and allowing such assumption in reason, the law does not raise any presumption of notice," in that the evidence fails to establish any adversary relation between Holbrook and the corporation; that it fails to take into consideration the fact that at the outset, before any timber lands had been acquired under the Timber and Stone Act, Holbrook had a discussion with the Curtises and Collinses as to the advisibility of obtaining timber land by buying out settlers who had acquired land under the Timber and Stone Act; that there was at that time a lot of land to be acquired and that there was no scrip to acquire it with and that he was authorized by them in the interests of the company that was to be formed to buy out entrymen who had acquired title to the land under the Timber and Stone Act and that he should receive as compensation for his services the difference between what he would have to pay the entrymen for the land and $7.50 an acre, which the company would pay him for the land; that at the time this conversation took place the Collinses did not believe that a solid body of timber land which had been taken up under the [239] Timber and Stone Act could be legally acquired by them, in that if legally acquired, someone else would come in and buy the tim-

ber land from the entrymen; that Holbrook was made the agent for the purpose of determining the character, quantity and quality of the timber that was upon the land and that it was adequate and satisfactory; that Holbrook was made their agent for the purpose of acquiring the title and seeing that the entries were regular in form and in conformity with law, and the instruments of conveying the title of the entrymen to the corporation were in form legally sufficient; and that no attorney was employed to see that the title had been conveyed to the company; that Holbrook was relied upon for the whole matter and was the agent of the company for that purpose; that at the time Holbrook started on his plan of operations in Plumas County he was not buying the land for himself from the entrymen, but he was buying it with the definite understanding with the Curtises and Collinses that the corporation should get the land; that there was no attempt on the part of the corporation or any of its officers in the slightest to check Holbrook in his operations and as a matter of fact, there was a studious avoidance on their part of the ordinary business precautions that exist between vendor and vendee in connection with every act on the part of the corporation and the Curtises and the Collinses in the acquiring of the title to the timber lands by the corporation, and that the circumstances of this case do not bring the case within the exception to the rule that where the agent's interests are antagonistic to that of the corporation, his knowledge is not presumed to be that of the corporation in that in carrying out the details of this transaction it

appears that the Curtises, Collinses and Holbrooks were all working in harmony [240] with perfect confidence and an understanding between them, with all of them fully alive to the situations and dangers under which the land was being acquired and the leaving of everything to Holbrook to carry on in his own way unhampered. If the younger Curtis and the two Collinses did not know of Holbrook's fraudulent operations, the same was due to their wilfully closing their eyes to circumstances which, at the outset, they did know must occur if a solid body of timber land was delivered to the Curtis, Collins and Holbrook Co. by the purchasing of the lands taken up by entrymen under the Timber and Stone Act.

60. Complainant excepts to the finding and report of the Master (page 104) that "If here not only Holbrook but Curtis and Collins had been charged with notice, there is no question but what the company would be held to be so charged," in that it infers that Curtis and Collins did not have notice of the fraud, which fails to take into consideration all the circumstances of the relations between Holbrook and Curtis and Collins and the full understanding that existed between them and if D. G. Curtis and the two Collinses did not know of the manner of the operations of Holbrook, it was due to a wilful closing of their eyes to the things which they knew must take place in order to deliver a solid body of timber land to the corporation.

61. Complainant excepts to the finding and report of the Master (page 105) that "Assuming that

the transaction here in question occurred between Curtis, Collins and Holbrook Co. and Holbrook, it has been seen that their relations were that of vendee and vendor respectively." "Remick and the others therefore could in no sense be considered subagents of the company; they were agents of [241] Holbrook and Tuman only. The notice, therefore, which they had by reason of their dealings with Holbrook may be imputed to Holbrook but could not be imputed to the company," in that this proposition assumes the point in issue to be whether or not Holbrook was the agent of the corporation. If Holbrook was the agent of the corporation in these transactions and in the acquiring of these lands, Remick and the others who assisted in the locating must also be considered as subagents of the company and further, it fails to take into consideration the fact that Holbrook was thoroughly familiar with the operations in the field in the acquiring of the lands from the Government.

62. Complainant excepts to the finding and report of the Master (page 105) that "In what has gone before I have assumed that the transaction was indicated by the way in which the deeds ran, that is to say, that Holbrook sold to the Curtis, Collins and Holbrook Company. As a matter of fact, as has been seen before, it is not an exact statement. The entrymen conveyed the title to Gregory who held as trustee for Holbrook. Holbrook meanwhile was under contract to sell these lands to T. D. Collins and J. G. Curtis at $7.50 and $10.00 an acre, part cash and part stock of the corporation. Curtis and Col-

lins at no time paid cash into the corporation for their stock, but made a proposition to transfer land for stock which was accepted. Undoubtedly the settlement as between Holbrook and Curtis and Collins and between Curtis and Collins and the Curtis, Collins & Holbrook Company was simultaneous. Though Gregory after the entrymen's deeds held the legal title, the entire equitable title rested in Holbrook his beneficiary, and when Holbrook fulfilled his contract with Curtis and [242] Collins this equitable title passed to Curtis and Collins, Gregory becoming their trustee for a point of time, and at their direction, in pursuance of their proposal to the company, Gregory conveyed the legal title to the company," in that there is no evidence to support said finding and as the master himself says, in his part of the report, all of this is more or less theoretical. The evidence shows that the deeds from the entrymen were taken to Gregory; that Gregory conveyed to the Curtis, Collins and Holbrook Company. The testimony of Dan Curtis is to the effect that the corporation paid Holbrook for the land. The same is true of the testimony of T. D. Collins and E. S. Collins. The evidence that Curtis and Collins were buying from Holbrook is contained entirely within the leading and suggestive questions of counsel for the defendant which the witnesses themselves are unable to keep in mind, except when having it suggested to them continually, showing that at the time the transaction took place, all the parties believed that the corporation was purchasing the land not from T. D. Collins and D. G. Curtis, but from someone from whom

Holbrook had negotiated the purchase of the land, and that at the time the transaction took place they knew that Gregory was not the real person in interest, because as T. D. Collins states, he does not know why the land was taken in the name of Gregory, except that he understood that it had to be assimilated in someone's name in order to meet the legal requirements of this state to get the title into the corporation. As T. D. Collins testified, he deposited his money in the Bank of California, and got his stock, one share representing $100 which he put up. The manner of paying for the lands was attended to by whomever was out here. [243]

63. Complainant excepts to the finding and report of the Master (page 106) that "If Curtis and Collins had paid Holbrook part cash and part from the stock which they already had by reason of the scrip transactions, they might have taken a deed of the legal title directly from Gregory and later conveyed that legal title by another deed to the Curtis, Collins and Holbrook Company," in that there is no evidence to show that Curtis and Collins paid Holbrook with stock which they had already secured by reason of the scrip transactions and as a matter of fact, the title never passed through them and on no theory of law could have been purged of fraud by such a transaction without the legal title actually having passed through said Curtis and Collins.

64. Complainant excepts to the finding and report of the Master (page 106) that "it is perfectly clear that Curtis and Collins had neither actual nor constructive notice of any possible fraud in these

cases," in that at the outset they knew there was danger of fraud being perpetrated in acquiring the lands; they did not expect to get a solid body of timbed land without fraud being perpetrated; they got a solid body of timber land and they took particular pains never to investigate or to allow anything to come to their attention which might put them on notice, and further, they were dealing as partners with Holbrook in that Curtis and Collins were putting up the money and Holbrook was getting the land and the way their interests were being divided was on a basis of the land being valued at $7.50 an acre or $10 an acre and Holbrook's interest was to be the difference between the cost of the land and the value for which he turned it in. [244]

64. Complainant excepts to the finding and report of the Master (page 106) that "the Curtis, Collins and Holbrook Company, even under the vice-presidency of Holbrook, taking it from two innocent purchasers, would have held free and clear of the Government claim," in that there is no evidence to show that the Curtis, Collins and Holbrook Co. had any land from two innocent purchasers or from anyone other than the entrymen through the agency of Holbrook and Gregory.

65. Complainant excepts to the finding and report of the Master (page 106) that "The Curtis, Collins and Holbrook Company acquired the land of E. L. Cooksey, described in the bill against him, and all the other lands in this consolidated cause, . . . by purchase in good faith for a valuable consideration and without notice, constructive or

actual of any equity in behalf of the United States," in that the same does not conform to the allegations of the answer and the defense of *bona fide* purchaser for valuable consideration and without notice being an affirmative defense, has not been established by any evidence and that the Master has failed to take into consideration all the matters specified in exception 58. [245]

66. Complainant excepts to the report of said Master and to "The Summary Findings and Conclusions" (page 131) on the ground that the Master erred in making finding No. 2 thereof in this:

A. That the finding

> "That the said deed was recorded at the request of C. H. Holbrook, Jr., acting in behalf of and at the direction of his father, C. H. Holbrook on September 10, 1904, in the proper records"

is not supported by the evidence in that the same would indicate that C. H. Holbrook, Jr., in having said deed recorded was acting as the agent of said C. H. Holbrook and had the custody of said deed for said C. H. Holbrook, whereas, the evidence establishes that when said deed was recorded the title to said land was vested in the Curtis, Collins and Holbrook Co., respondent herein, and that said deed was held and recorded by said C. H. Holbrook, Jr., as the agent of the said Curtis, Collins and Holbrook Co.

B. That the finding

> "That the said Charles E. Gregory was a

trustee for said Chas. H. Holbrook in taking and holding title to said land"

is not supported by the evidence in that the same would indicate that said Gregory was holding title for the sole benefit of said C. H. Holbrook, whereas the evidence establishes that Holbrook was the operating agent for the combination of Curtis, Collins and Holbrook who formed the Curtis, Collins and Holbrook Co. for the purpose of holding these and other timber lands which they had accumulated.

C. That the finding

"That said conveyance was made in pursuance of a prior contract between said C. H. Holbrook on the one hand, and T. D. Collins and J. G. Curtis on the other, whereby Holbrook agreed to sell to Curtis and Collins or to said corporation, if so directed by Curtis and Collins, and said Curtis and Collins agreed to buy from said Holbrook the lands described in said deed at the [246] rate of either $7.50 or $10.00 an acre, and said Curtis and said Collins paid to said C. H. Holbrook a valuable consideration for said conveyance to said corporation, namely, part cash and part stock of said corporation transferred to said Holbrook, the total purchase price so paid being at the rate of $7.50 or $10 per acre"

is not supported by the evidence in that the same would indicate that Holbrook was selling timber land to Curtis and Collins whereas the evidence establishes that Holbrook had no timber land to sell. The evidence establishes that Curtis and Collins and

Holbrook had entered into an agreement for the formation of a corporation to hold timber lands in which each of them, including Holbrook, was to have a substantial interest; that they desired to get title to a large body of timber land, the land involved in this suit being a part thereof, that said land belonged to the complainant and was vacant Government land; that Holbrook was authorized to get title to this land by purchasing the claims of persons who should enter the land; that Holbrook was to be the selector of the lands desired and conduct all the negotiations necessary to acquire title to said lands; that Collins and Curtis were to put up the necessary money and Holbrook his time and knowledge; that for said money Collins and Curtis should get stock at $100 per share, and to fix Holbrook's share in the transaction he was allowed for a time $7.50 and later $10.00 per acre for which he took part stock and part cash, the cash being necessary to carry on the operations.

D. That the finding

"That on May 2, 1903, neither said T. D. Collins or J. G. Curtis or the Curtis, Collins and Holbrook Co. knew or were charged with knowledge of said fraud hereinbefore set forth or any fraud at all; and the said Curtis and Collins and the said corporation did not know and did not become charged with knowledge of said or any other fraud in the obtaining of said patent until on or about the year 1908; that the said Curtis, Collins and Holbrook Co., a corporation, was therefore at the time of its ac-

quisition of the land conveyed to said [247] Cooksey by said patent a *bona fide* purchaser for a valuable consideration and without notice or knowledge of any fraud against the United States; that said deed to said corporation was recorded in the proper office at the request of said company on October 18, 1909,"

is not supported by the evidence and is contrary thereto in that it wholly fails to take into consideration and totally ignores the fact that at the time Holbrook discussed with the Collinses and Curtises the advisability of purchasing timber and stone entrymen's claims, E. S. Collins knew that this method of acquiring timber lands had resulted in scandal in Washington and that he was desirous that no scandal arise in connection with their lands, that he did not believe that a solid body of timber land could be obtained legally under the Timber and Stone Act for if they were acquired legally someone else would buy out the entrymen and that the company did, by this method, acquire a solid body of timber land, namely, the land which Remick had entrymen take up; and that other portions of the land taken up were also solid and adjoined land which the Curtis, Collins and Holbrook Co. had previously acquired by the scrip method; and the fact that in all their discussion, which was considerable, about acquiring land by the purchase of claims taken up under the Timber and Stone Act, they never discussed the matter or consulted with their attorney, C. A. Shurtleff; and that, after having decided upon the acquiring of land which had

been taken up under the Timber and Stone Act, they should never have discussed the matter of the method of acquiring these timber claims again with Mr. Holbrook; that there was no investigation made of the titles in any way, either that the lands had ever been taken up under the Timber and Stone Act or that the entryman and his successor in interest had ever made deeds conveying the title to said lands to the company; and that the deeds [248] from the entrymen were obtained so shortly after the date of making final proof, which of itself has been held to be not sufficient to charge notice, yet taken with all the other circumstances in this case is indicative either of actual knowledge of the fraud or a careful and assiduous effort on the part of the Curtises and Collinses not to learn of any fraud; and the fact that the slightest investigation of the titles would have established, accepting their own construction of the facts, if not that a fraud had been perpetrated upon the Government, that a fraud had been perpetrated upon them in that Holbrook was representing that he could not get the land for $7.50 per acre, whereas as a matter of fact, he was getting most of it for about $3.75 per acre, the discovery of which fraud would have meant Holbrook's ruination; and the fact that at the time they were purchasing these lands, they were not purchasing the legal title, but were merely purchasing the equitable title which of itself should have made them more careful in regard to the title which they were acquiring; and the fact that the deeds from the entrymen to Greg-

ory had not been recorded at the time the corporation got its title; and the fact that the corporation did not place its deeds from Gregory of record in a great many cases until after the institution of these suits, although at the time that Holbrook sold out it became definitely and certainly known that the corporation's deeds had not been placed of record; and the fact that the corporation did not have the deeds from the entrymen to Gregory recorded until after patent had issued in each case; and the fact that Tuman was paid [249] $150,000 for his 200 shares of stock, which Collins did not believe to be worth more thon half the price paid, the excuse being given for such a price that he was afraid that a third person, Durphy, was going to get the stock, whom he did not wish to have in the corporation, which excuse becomes trivial when it is considered that over 5,000 shares of the stock had been issued and that T D. Collins and E. S. Collins owned all of said stock with the exception of the 200 shares which Tuman owned, and had absolute control of the corporation and that said corporation was a holding company, holding nothing but timber land and was not operating any of its timber lands, and that said stock was a source of expense and would be for years to come; and that Tuman's stock was purchased after the commencement of these suits; and that Tuman refused to state to the Government's attorney before he went on the stand to testify why title was taken in the name of Gregory from the entrymen, and the source of the money which was used for operating in the field in acquir-

ing these lands; and the fact that in Tuman's settlemen with Holbrook he did not get more than half of what he was entitled to, and that said contract of settlement was negotiated by T. D. Collins; and the fact that J. H. Remick, one of the locators, was always in court and the peculiar changes in the testimony of A. W. Savercool and Warren Stark during the course of the trial taken in connection with James Savercool's and Willis Savercool's testimony, and the character of the testimony of James Stark, Burt Burris, and other witnesses, and the fact that in the purchase of some of the lands [250] Holbrook had to pay $10 an acre for the land and that the corporation got the land for the price of $10 an acre; and the fact that Collins knew that on other lands than the land acquired under the Timber and Stone Act, and the land acquired under the contract Exhibit "B" in evidence, Holbrook did not get any commissions from the company, although he negotiated the purchases for the company and was its purchasing agent therein, and the fact that Holbrook was the agent for the company to determine the character, quantity and quality of the timber on the lands purchased and the fact that Holbrook was the agent of the company to determine that the titles were regular; and the fact that Holbrook was the agent of the company to determine that the title had been properly vested in the company; and the fact that Holbrook was managing director and vice-president of the corporation and had complete charge of all the papers and records of said corporation, and that his sig-

nature was necessary on the corporation checks.

In support of the foregoing exceptions A, B, C and D, to the summary of special findings and conclusions of the Master we rely on the transcript of the testimony of T. D. Collins, E. S. Collins, J. C. Curtis, D. G. Curtis, Chas. H. Holbrook, Jr., G. E. Tuman, Chas. A. Schurtleff, J. E. Remick, John Heppe, Irving Moulton and the testimony of all the entrymen as showing the method of procedure in all cases in taking up the land, and the testimony of Edward Brase, Burt Burris, F. G. Hail, A. A. Hall, Mrs. Cora Hall, Chas. E. Gregory, W. G. Lawrence, James Perini, Frank Sorsoli, Chas. E, Swayze and Arthur E. Vollmer.

67. Excerpts to the conclusion of said Master (page 133) of said report in that the Master erred in drawing the conclusion that said bill of complaint herein be dismissed, [251] but should have found that the patent herein be cancelled on the ground of the fraudulent procuring of the issuance of said patent by the complainant.

68. Complainant hereby saves all exceptions to rulings of the Master made during the taking of testimony herein as the same appears in the transcript of testimony.

69. Complainant particularly saves the exception to the ruling of the Master excluding the account of Collins and Holbrook with the Bank of California for the purpose of showing that Collins was interested in the money used to carry on the operations of Holbrook and Tuman in Plumas County in acquiring the lands therein.

70. Complainant particularly saves the exception to the ruling of the Master excluding Land Office records of some sixteen entries which had been canceled on the ground of fraud, the lands covered by said records having been purchased by the Curtis, Collins and Holbrook Co., and the fact that nothing had been done to protect the company's interest in said lands in the General Land Office for the purpose of showing as an admission by conduct, guilty knowledge of the fraud on the part of the corporation. [252]

No. 71. Complainant excepts to the ruling of the Master refusing to grant complainant further time to prepare and file his specifications of exceptions to the reports of the Master in these 79 consolidated cases of which this action is one; and in this behalf states that in the late afternoon of December 22d, 1913, the United States Attorney's office received word that the Master's draft report in the case of Edward L. Cooksey and nineteen other of the 79 consolidated cases, to wit, the cases of

John Huntington..... 15,078
J. Warren Stark..... 15,079
Leonard E. Remick..... 15,080
Andrew J. Isenberg..... 15,081
Gertie Terrell..... 15,091
Thomas W. Burris..... 15,092
Ella J. Burris..... 15,093
Willard C. Brown..... 15,094
Minerva S. Brown..... 15,095
Charles S. Pierce..... 15,096
Rebecca H. Heppe..... 15,098

James L. Stark..... 15,101
Roy Stark..... 15,169
Ella E. Udall..... 15,165
Alexander Anderson.... 15,166
Nancy Anderson..... 15,098
Lorenzo A. Nissen..... 15,170
Roscoe C. Wilcox..... 15,198
Florence Wilcox..... 15,199

was prepared and might be inspected in the Master's office. That said 79 consolidated cases are under the exclusive charge of Earl H. Pier, assistant United States Attorney, and no one else is familiar with the details of the same; that at the time said reports were submitted for inspection said Earl H. Pier had charge of other matters which required his immediate and sole attention until after January 5th, 1914; that at the time said draft report was submitted said Master required exceptions to be filed to said report by January 21st, 1914, and stated that said time would not be extended; that since rendering said twenty reports [253] the Master has rendered reports in all the other of the 79 cases, which said reports altogether constitute between 625 and 650 pages of reports, and has required that the exceptions to all of said reports be filed at various dates on or before February 9th, 1914; that the transcript of the testimony taken covers over 3,400 pages of typewriting; that on account of the arrangement and manner of making said reports and their size and contents, it is impossible to properly prepare exceptions to said reports under ninety days; that com-

plainant applied on January 19th, 1914, to the Master for additional time within which to file his exceptions to said reports, which was refused; that complainant assigns the action of the Master in refusing to allow the additional time within which to file exceptions to said reports as an arbitrary abuse of discretion.

That the facts set forth as the basis of this exception not contained in the record will be supported by affidavit which will be prepared and filed herein as soon after the filing of these exceptions as the business of the United States Attorney's office will permit.

JOHN W. PRESTON,
United States Attorney,
Attorney for Complainant.

EARL H. PIER,
Assistant United States Attorney,
Of Counsel.

[Endorsed]: Service of the within exceptions to Master's draft report by copy admitted this 21st day of Jan., 1914.

CHARLES A. SHURTLEFF,
J. G. DE FOREST,
Attorneys for Defts.

Filed Jan. 21, 1914. H. M. Wright, Master in Chancery.

Filed Feb. 21, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [254]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,077.

UNITED STATES OF AMERICA,
Complainant,

vs.

EDWARD L. COOKSEY et al.,
Defendants.

No. 15,078.

UNITED STATES OF AMERICA,
Complainant,

vs.

JOHN HUNTINGTON et al.,
Defendants.

No. 15,079.

UNITED STATES OF AMERICA,
Complainant,

vs.

J. WARREN STARK et al.
Defendants.

No. 15,080.

UNITED STATES OF AMERICA,
Complainant,

vs.

LEONARD C. REMICK et al.,
Defendants.

No. 15,081.

UNITED STATES OF AMERICA,
Complainant,

vs.

ANDREW ISENBERG et al.,
Defendants.

No. 15,091.

UNITED STATES OF AMERICA,
Complainant,

vs.

GERTIE TERRELL et al.,
Defendants. [255]

No. 15,092.

UNITED STATES OF AMERICA,
Complainant,

vs.

THOS. W. BURRIS et al.,
Defendants.

No. 15,093.

UNITED STATES OF AMERICA,
Complainant,

vs.

ELLA J. BURRIS et al.,
Defendants.

No. 15,094.

UNITED STATES OF AMERICA,

vs.

WILLARD C. BROWN et al.,

Defendants.

No. 15,095.

UNITED STATES OF AMERICA,

Complainant,

vs.

MINERVA S. BROWN et al.,

Defendants.

No. 15,096.

UNITED STATES OF AMERICA,

Complainant,

vs.

CHAS. S. PIERCE et al.,

Defendants.

No. 15,097.

UNITED STATES OF AMERICA,

Complainant,

vs.

REBECCA H. HEPPE et al.,

Defendants.

No. 15,098.

UNITED STATES OF AMERICA,
Complainant,

vs.

NANCY ANDERSON et al.,
Defendants.

No. 15,099.

UNITED STATES OF AMERICA,
Complainant,

vs.

HENRIETTA TUMAN et al.,
Defendants. [256]

No. 15,100.

UNITED STATES OF AMERICA,
Complainant,

vs.

LEROY BENNER et al.,
Defendants.

No. 15,101.

UNITED STATES OF AMERICA,
Complainants,

vs.

JAMES L. STARK et al.,
Defendants.

No. 15,102.

UNITED STATES OF AMERICA,
Complainant,

vs.

BENJ. F. WARDLAW et al.,
Defendants.

No. 15,103.

UNITED STATES OF AMERICA,
Complainant,

vs.

GEORGE A. HALL et al.,
Defendants.

No. 15,104.

UNITED STATES OF AMERICA,
Complainant,

vs.

DELLA HALL et al.,
Defendants.

No. 15,105.

UNITED STATES OF AMERICA,
Complainant,

vs.

REUBEN J. MITCHELL et al.,
Defendants.

No. 15,106.

UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIS SAVERCOOL et al.,
Defendants.

No. 15,107.

UNITED STATES OF AMERICA,
Complainant,

vs.

JAMES SAVERCOOL et al.,
Defendants. [257]

No. 15,108.

UNITED STATES OF AMERICA,
Complainant,

vs.

JACOB S. AID et al.,
Defendants.

No. 15,109.

UNITED STATES OF AMERICA,
Complainant,

vs.

THOS. L. AID et al.,
Defendants.

No. 15,110.

UNITED STATES OF AMERICA,
Complainant,

vs.

JOS. OGLE et al.,
Defendants.

No. 15,111.

UNITED STATES OF AMERICA,
Complainant,

vs.

JACOB HENSLEY et al.,
Defendants.

No. 15,112.

UNITED STATES OF AMERICA,
Complainant,

vs.

ELIJAH TAYLOR et al.,
Defendants.

No. 15,113.

UNITED STATES OF AMERICA,
Complainant,

vs.

ROBT. CHAS. TAYLOR et al.,
Defendants.

No. 15,114.

UNITED STATES OF AMERICA,
Complainant,

vs.

CHARLES MOORE et al.,
Defendants.

No. 15,115.

UNITED STATES OF AMERICA,
Complainant,

vs.

CHAS. H. BUTLER et al.,
Defendants. [258]

No. 15,116.

UNITED STATES OF AMERICA,
Complainant,

vs.

GEO. MARION COOKSEY et al.,
Defendants.

No. 15,117.

UNITED STATES OF AMERICA,
Complainant,

vs.

MARTHA L. ZUSCHLAG et al.,
Defendants.

No. 15,118.

UNITED STATES OF AMERICA,
Complainant,

vs.

HENRY CLAY WHITE et al.,
Defendants.

No. 15,119.

UNITED STATES OF AMERICA,
Complainant,

vs.

HARRY E. JOHNSON et al.,
Defendants.

No. 15,135.

UNITED STATES OF AMERICA,
Complainant,

vs.

HENRY MORLEY et al.,
Defendants.

No. 15,136.

UNITED STATES OF AMERICA,
Complainant,

vs.

MAMIE OGLE et al.,
Defendants.

No. 15,138.

UNITED STATES OF AMERICA,
Complainant,

vs.

JAMES W. RHODES et al.,
Defendants.

No. 15,153.

UNITED STATES OF AMERICA,
Complainant,

vs.

PLINY P. HUDSON et al.,
Defendants. [259]

No. 15,154.

UNITED STATES OF AMERICA,
Complainant,

vs.

JAMES T. TAYLOR et al.,
Defendants.

No. 15,155.

UNITED STATES OF AMERICA,
Complainant,

vs.

MOLLIE SCOTT et al.,
Defendants.

No. 15,156.

UNITED STATES OF AMERICA,
Complainant,

vs.

FRED SCOTT et al.,
Defendants.

No. 15,157.

UNITED STATES OF AMERICA,
Complainant,

vs.

EDWARD BRASE et al.,
Defendants.

No. 15,158.

UNITED STATES OF AMERICA,
Complainant,

vs.

JACK PERINI et al.,
Defendants.

No. 15,159.

UNITED STATES OF AMERICA,
Complainant,

vs.

HERMAN GARTELMAN et al.,
Defendants.

No. 15,163.

UNITED STATES OF AMERICA,
Complainant,

vs.

JAMES D. BAKER et al.,
Defendants.

No. 15,164.

UNITED STATES OF AMERICA,
Complainant,

vs.

MAYME H. BAKER et al.,
Defendants. [260]

No. 15,165.

UNITED STATES OF AMERICA,
Complainant,

vs.

ELLA E. UDALL et al.,
Defendants.

No. 15,166.

UNITED STATES OF AMERICA,
Complainant,

vs.

ALEX. H. ANDERSON et al.,
Defendants.

No. 15,167.

UNITED STATES OF AMERICA,
Complainant,

vs.

ELLA SPRING et al.,
Defendants.

No. 15,168.

UNITED STATES OF AMERICA,
Complainant,

vs.

CARRIE M. ALLEN et al.,
Defendants.

No. 15,169.

UNITED STATES OF AMERICA,
Complainant,

vs.

ROY STARK et al.,
Defendants.

No. 15,170.

UNITED STATES OF AMERICA,
Complainant,

vs.

LORENZO A. NISSON et al.,
Defendants.

No. 15,171.

UNITED STATES OF AMERICA,
Complainant,

vs.

JOHN H. KELLY et al.,
Defendants.

No. 15,172.

UNITED STATES OF AMERICA,
Complainant,

vs.

ARTHUR W. SAVERCOOL et al.,
Defendants. [261]

No. 15,173.

UNITED STATES OF AMERICA,
Complainant,

vs.

S. G. EASTMAN et al.,
Defendants.

No. 15,174.

UNITED STATES OF AMERICA,
Complainant,

vs.

JOHN L. GRAY et al.,
Defendants.

No. 15,175.

UNITED STATES OF AMERICA,
Complainant,

vs.

I. M. CHRISTENSEN et al.,
Defendants.

No. 15,176.

UNITED STATES OF AMERICA,
Complainant,

vs.

ROBT. M. CAMERON et al.,
Defendants.

No. 15,177.

UNITED STATES OF AMERICA,
Complainant,

vs.

IRA T. JOHNSON et al.,
Defendants.

No. 15,178.

UNITED STATES OF AMERICA,
Complainant,

vs.

JOS. I. KELLEY et al.,
Defendants.

No. 15,179.

UNITED STATES OF AMERICA,
Complainant,

vs.

EMMA L. KELLEY et al.,
Defendants.

No. 15,180.

UNITED STATES OF AMERICA,
Complainant,

vs.

J. J. SELF et al.,
Defendants. [262]

No. 15,181.

UNITED STATES OF AMERICA,
Complainant,

vs.

JOHN VANORUM et al.,
Defendants.

No. 15,186.

UNITED STATES OF AMERICA,
Complainant,

vs.

MARGARET J. BAKER et al.,
Defendants.

No. 15,187.

UNITED STATES OF AMERICA,
Complainant,

vs.

GEO. D. GARDENHIRE et al.,
Defendants.

No. 15,188.

UNITED STATES OF AMERICA,
Complainant,

vs.

CHAS. J. MONROE et al.,
Defendants.

No. 15,189.

UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM J. GARDENHIRE et al.,
Defendants.

No. 15,190.

UNITED STATES OF AMERICA,
Complainant,

vs.

CHAS. J. ALLEN et al.,
Defendants.

No. 15,191.

UNITED STATES OF AMERICA,
Complainant,

vs.

MABEL L. CHAMBERLAIN et al.,
Defendants.

No. 15,192.

UNITED STATES OF AMERICA,
Complainant,

vs.

DELLA P. KELLY et al.,
Defendants. [263]

No. 15,193.

UNITED STATES OF AMERICA,
Complainant,

vs.

FRANK E. KRUGER et al.,
Defendants.

No. 15,194.

UNITED STATES OF AMERICA,
Complainant,

vs.

LILLIAN E. SAVERCOOL et al.,
Defendants.

No. 15,195.

UNITED STATES OF AMERICA,
Complainant,

vs.

JOHN W. AID et al.,
Defendants.

No. 15,196.

UNITED STATES OF AMERICA,
Complainant,

vs.

JAMES D. AID et al.,
Defendants.

No. 15,197.

UNITED STATES OF AMERICA,
Complainant,

vs.

HENRY M. SMITH et al.,
Defendants.

No. 15,198.

UNITED STATES OF AMERICA,
Complainant,

vs.

ROSCOE C. WILCOX et al.,
Defendants.

No. 15,199.

UNITED STATES OF AMERICA,
Complainant,

vs.

FLORENCE N. WILCOX et al.,
Defendants.

No. 15,202.

UNITED STATES OF AMERICA,
Complainant,

vs.

CARRIE L. ROSS et al.,
Defendants. [264]

No. 15,200.

UNITED STATES OF AMERICA,
Complainant,

vs.

JOHN ZUSCHLAG et al.,
Defendants.

Stipulation That Exceptions Before Master may Stand Before Court.

IT IS HEREBY STIPULATED by and between the parties hereto that the objections and exceptions heretofore filed by each of the parties hereto to the reports of the Master in Chancery with said Master and which have by said Master been filed with the clerk of the above-entitled court, may stand respectively and be in and before the above-entitled court

in each of said cases as objections and exceptions of each of the parties hereto to each of said reports of said Master filed with the clerk of the court in each of the above-entitled cases.

AND IT IS FURTHER STIPULATED AND AGREED that each party hereto saves to itself an objection and exception to each of the adverse rulings of said Master in Chancery contained in the Supplemental Report filed by said Master in each of the above-entitled cases.

AND IT IS FURTHER STIPULATED that each of said parties may refer to all or any part of the transcript of testimony taken before said Master in Chancery to support any and all objections and exceptions taken to [265] each of said reports or to support the findings of the Master in Chancery.

Dated March 11, 1914.

JOHN W. PRESTON,
United States Attorney,
Attorney for Complainant.

CHARLES A. SHURTLEFF,
Attorney for Defendant Curtis, Collins & Holbrook Co.

J. G. DE FOREST,
Attorney for Entrymen Who Have Appeared in any of Said Cases.

It is so ordered.

M. T. DOOLING,
Judge.

[Endorsed]: Filed March 11, 1914. Walter B. Maling, Clerk. [266]

In the Southern Division of the District Court of the United States, for the Northern District of California, Second Division.

No. 15,077 and cases numbered 15,078; 15,079; 15,080; 15,081; 15,091; 15,092; 15,093; 15,094; 15,095; 15,096; 15,097; 15,098; 15,099; 15,100; 15,101; 15,102; 15,103; 15,104; 15,105; 15,106; 15,107; 15,108; 15,109; 15,110; 15,111; 15,112; 15,113; 15,114; 15,115; 15,116; 15,117; 15,118; 15,119; 15,135; 15,136; 15,138; 15,153; 15,154; 15,155; 15,156; 15,157; 15,158; 15,159; 15,163; 15,164; 15,165; 15166; 15,167; 15,168; 15,169; 15,170; 15,171; 15,172; 15,173; 15,174; 15,175; 15,176; 15,177; 15,178; 15,179; 15,180; 15,181; 15,186; 15,187; 15,188; 15,189; 15,190; 15,191; 15,192; 15,193; 15,194; 15,195; 15,196; 15,197; 15,198; 15,199; 15,200; 15,202.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWARD L. COOKSEY et al.,

Defendants.

Memorandum Opinion.

JOHN W. PRESTON, United States Attorney, EARL H. PIER, Assistant United States Attorney, and FRANK HALL, Special Assistant Attorney General, for Plaintiff.

CHARLES A. SHURTLEFF and JAMES G. DE FOREST, for Defendants.

VAN FLEET, District Judge:

This and seventy-eight other cases, the numbers of which are given above, all brought by the Government to set aside patents to different parcels of land issued under the so-called "Timber and Stone Act" of June 3, 1878, were consolidated for hearing, and by stipulation of the parties ordered referred to the Master to take the evidence and report his findings of fact and conclusions of law thereon. The Master's final report consists of special findings in each [267] separate case, and is accompanied by a general report in the nature of an opinion covering certain facts common to all, with an elaborate discussion of the law. The report recommends that in each case a decree be entered dismissing the bill. The cases are now before the Court on exceptions—some seventy-one in number—to the Master's report interposed by the plaintiff.

At the threshold of its consideration of these exceptions, the Court is confronted by the principles announced in Kimberley vs. Arms, 129 U. S. 512, limiting the character of review that may be indulged by this Court on exceptions to a Master's findings where the reference has been had by consent of the parties. It is there said:

> "When the parties consent to the reference of a case to a Master or other officer to hear and decide all the issues therein, and report his findings, both of fact and of law, and such reference is entered as a rule of the court, the Master is clothed with very different powers

from those which he exercises upon ordinary references, without such consent; and his determinations are not subject to be set aside and disregarded at the mere discretion of the Court. A reference by consent of parties, of an entire case for the determination of all its issues, though not strictly a submission of the controversy to arbitration—a proceeding which is governed by special rules—is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law. Its findings, like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the Court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise. . . .

"To disregard the findings and treat the report as a mere presentation of the testimony is to defeat, as we conceive, the purpose of the reference and disregard the express stipulation of the parties." [268]

In the later case of Davis vs. Schwartz, 155 U. S. 636, the same principles are thus stated:

"As the case was referred by the Court to a Master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as

it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a Circuit Court in a case tried by the Court under Rev. Stat., sec. 649, or in an admiralty cause appealed to this Court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable."

And in Connor vs. United States the Circuit Court of Appeals of this circuit, upon authority of the foregoing cases, holds that in an instance of reference to the Master by a stipulation of the parties of the entire case, the Court is limited in its review of the Master's findings to a consideration of whether there was evidence tending substantially to their support; and where there is they cannot be disturbed by the trial court. (See, also, Adamson vs. Gilliland, Adv. Sh., Supreme Court, decided January 8, 1917.)

An examination of the record in this case, and the evidence called to our attention by both parties, discloses that the foregoing principles apply to all but four or five of the exceptions presented, the latter involving rulings of the Master on questions of law, there being found in all instances of the former class a substantial conflict in the evidence upon which the Master's finding was based. This

precludes the character of review asked by plaintiff.

Of the rulings of the Master on questions of law, [269] that denying plaintiff's application to amend its bill pending the hearing falls within the same principles. It appears that this application was first addressed to the Court, but before its determination a stipulation of the parties was filed sending the application to the Master for his determination with the other questions in the case, and he having by such action, as suggested in Kimberley vs. Arms, been created "a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law," his ruling upon a question so essentially addressed to his discretionary powers must be held equally unassailable in this court.

The remaining exceptions involve rulings of the Master on the admission or exclusion of evidence. Assuming that, within the above principles, they remain open to the consideration of this Court as to their propriety, they have been given careful consideration, and the Court is of opinion that in each instance they are without error materially affecting the rights of the parties.

It is urged that certain of the findings of the Master on the question of fraud in the inception of the title of the entrymen are without support in the evidence. But aside from the view, as above expressed, that this contention is without merit, these considerations become immaterial in view of the fact that the Master found in each case that the

Curtis, Collins & Holbrook Company was an innocent purchaser for value of the particular parcel of land involved. [270]

Not only was there ample evidence to sustain this latter finding, but a careful consideration of the Master's report in all its aspects satisfies me that his conclusion that the title of the present holder of these lands is unassailable is amply sustained by the principles announced in United States vs. Detroit Timber etc. Co., 200 U. S. 321; United States vs. Clark, Id. 601; and many cases that could be cited from the other federal courts.

As to the objection that the defense or plea of *bona fide* purchaser is insufficiently framed, there having been no exception or objection interposed thereto prior to the hearing it is now too late to be availed of. People's Bank vs. Gilson, 161 Fed. 286; Adam vs. Norris, 103 U. S. 591. The defense is clearly sufficient in general outline, and the objection now made, that the amount of consideration paid for the land should have been stated, is a feature which should have been called to defendant's attention before submission of the case on the evidence. Moreover, I regard the proof as fully sustaining the requirements of the rule in its strictest application.

The other questions urged do not require special notice. They all fall more or less directly within the suggestions above stated.

The exception to the Master's report will be overruled, and a decree in each case may be entered in conformity with the recommendation in his report.

[Endorsed]: Filed Jan. 19, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [271]

At a stated term, to wit, the November term, A. D. 1916, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Friday, the 19th day of January, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,077.

UNITED STATES

vs.

EDWARD L. COOKSEY.

(Order Overruling Plaintiff's Exceptions to Master's Report, etc.)

In accordance with the memorandum opinion filed, it is ordered that the exceptions to the Master's Report be overruled, that the Master's Report be and is confirmed, and that a decree be entered in conformity with said report. [272]

In the District Court of the United States, in and for the Northern District of California, Second Division.

(Formerly)

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

IN EQUITY—No. 15,077.

UNITED STATES OF AMERICA,
Complainant,

vs.

EDWARD L. COOKSEY, CHARLES E. GREGORY, CURTIS, COLLINS & HOLBROOK COMPANY, a Corporation, JOHN DOE, RICHARD DOE, ALBERT DOE, HENRY DOE, GEORGE DOE and FREDERICK DOE,
Defendants.

Decree Confirming Master's Report and Dismissing Bill of Complaint.

This cause came on to be heard before this Court at this term, and it was argued by counsel for the respective parties, and thereupon, upon consideration thereof,

IT WAS ORDERED, ADJUDGED AND DECREED as follows, viz.: That each and all of the objections and exceptions to the Master's report, returned herein, be and they are overruled; that the said Master's report be, and the same is confirmed in every respect, and that the bill of com-

plaint of said complainant, United States of America, in the above-entitled cause be, and the same is hereby dismissed without cost to either party.

Done in open court this 13th day of April, 1917.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed and Entered Apr. 13, 1917. Walter B. Maling, Clerk. [273]

In the District Court of the United States, Northern District of California, Second Division.

(Formerly)

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

IN EQUITY.

No. 15,077.

UNITED STATES OF AMERICA,
Complainant,

vs.

EDWARD L. COOKSEY, CHARLES E. GREGORY, CURTIS, COLLINS & HOLBROOK COMPANY, a Corporation et al.,
Defendants.

No. 15,078.

UNITED STATES OF AMERICA,
Complainant,

vs.

JOHN HUNTINGTON et al.,
Defendants.

No. 15,091.

UNITED STATES OF AMERICA,
Complainant,

vs.

GERTIE TERRELL et al.,
Defendants.

No. 15,097.

UNITED STATES OF AMERICA,
Complainant,

vs.

REBECCA H. HEPPE et al.,
Defendants. [274]

No. 15,099.

UNITED STATES OF AMERICA,
Complainant,

vs.

HENRIETTA TUMAN et al.,
Defendants.

No. 15,105.

UNITED STATES OF AMERICA,

Complainant,

vs.

REUBEN J. MITCHELL et al.,

Defendants.

No. 15,108.

UNITED STATES OF AMERICA,

Complainant,

vs.

JACOB S. AID et al.,

Defendants.

No. 15,109.

UNITED STATES OF AMERICA,

Complainant,

vs.

THOMAS S. AID et al.,

Defendants.

No. 15,112.

UNITED STATES OF AMERICA,

Complainant,

vs.

ELIJAH TAYLOR et al.,

Defendants. [275]

No. 15,113.

UNITED STATES OF AMERICA,
Complainant,

vs.

ROBERT CHARLES TAYLOR et al.,
Defendants.

No. 15,135.

UNITED STATES OF AMERICA,
Complainant,

vs.

HENRY MORLEY et al.,
Defendants.

No. 15,163.

UNITED STATES OF AMERICA,
Complainant,

vs.

JAMES D. BAKER et al.,
Defendants.

No. 15,164.

UNITED STATES OF AMERICA,
Complainant,

vs.

MAYME H. BAKER et al.,
Defendants.

No. 15,168.

UNITED STATES OF AMERICA,
Complainant,

vs.

CARRIE M. ALLEN et al.,
Defendants. [276]

No. 15,174.

UNITED STATES OF AMERICA,
Complainant,

vs.

JOHN L. GRAY et al.,
Defendants.

No. 15,180.

UNITED STATES OF AMERICA,
Complainant,

vs.

M. JACKSON SELF et al.,
Defendants.

No. 15,181.

UNITED STATES OF AMERICA,
Complainant,

vs.

JOHN VANORNUM et al.,
Defendants.

No. 15,186.

UNITED STATES OF AMERICA,
Complainant,

vs.

MARGARET J. BAKER et al.,
Defendants.

No. 15,187.

UNITED STATES OF AMERICA,
Complainant,

vs.

GEORGE D. GARDENHIRE et al.,
Defendants. [277]

No. 15,188.

UNITED STATES OF AMERICA,
Complainant,

vs.

CHARLES J. MONROE et al.,
Defendants.

No. 15,189.

UNITED STATES OF AMERICA,
Complainant,

vs.

WILLIAM J. GARDENHIRE et al.,
Defendants.

No. 15,190.

UNITED STATES OF AMERICA,

Complainant,

vs.

CHARLES J. ALLEN et al.,

Defendants.

No. 15,195.

UNITED STATES OF AMERICA,

Complainant,

vs.

JOHN W. AID et al.,

Defendants.

No. 15,196.

UNITED STATES OF AMERICA,

Complainant,

vs.

JAMES D. AID et al.,

Defendants. [278]

Consolidated Statement of the Evidence Under Rule 75.

BE IT REMEMBERED, That the above-entitled cases being regularly set for hearing before the Honorable H. M. WRIGHT, Master in Chancery; that prior to the hearing, the above-entitled court did make its order consolidating the above-entitled cases for the purposes of the hearing and the taking of testimony before the Master in Chancery;

that thereafter, to wit, on the 8th day of November, 1912, the above-entitled cases came on regularly for hearing, the plaintiff being represented by Assistant United States Attorney, Earl H. Pier, and the defendant, Curtis, Collins & Holbrook Company, being represented by Charles A. Shurtleff, Esq.; that the following testimony was taken before the Hon. H. M. Wright, Master in Chancery, and that all of the testimony material to the above-entitled cases taken before the said Master in Chancery is contained in the following condensed statement of the evidence prepared in pursuance of Rule 75.

Testimony of George E. Tuman, for Complainant.

GEORGE E. TUMAN, called as a witness for the complainant, testified as follows:

My name is George Tuman; I live in Fruitvale, Cal., at 1665 Fruitvale Ave. My business is dealing in timber land. Place of business 1041-1043 Monadnock Building, San Francisco. Arthur Elam has the same place of business. I am [279] interested and associated with him in a corporation. During the years 1901–2–3 I lived part of the time in Prattville, Plumas County and Tehama, Tehama County, Cal., and some of the time in San Francisco. At that time my business was cruising timber and dealing in timber lands. I first started cruising timber in Plumas Co. in the years 1901 and 2 with N. F. Golden. Later I had A. W. Elam in my party. In 1901 my financial resources amounted to about $10,000. I knew C. H. Holbrook, Sr., in his lifetime and first met him when he was manager

(Testimony of George E. Tuman.)

of the mill near the town of Dunsmuir in 1898. I know C. H. Holbrook, Jr.; met him first some time in the fall of 1901. I know J. E. Remick, the gentleman sitting at the end of the table. I first met him some time during the summer of 1901. I knew his brother L. C. Remick in 1902. I first met Mr. Elam in the summer of 1901. I know John H. Heppe and first met him during the summer of 1901. I know A. F. Head and met him in the winter of 1901 and 1902. I know John W. Aid and met him first during the summer of 1902. I knew Alexander Cameron in his lifetime. He is now dead. I first met him in 1901–02. There were two Bunnells. One was L. A. Bunnell and one was L. W. Bunnell. I know both of them. Luke Bunnell is L. A. Bunnell. I met young Holbrook first in San Francisco. I met J. E. Remick first in Prattville, Plumas County. I first met Elam at Prattville and Heppe likewise at Prattville. I presume I met Aid at Prattville, though I am not certain. [280] Cameron I met, I think, in Prattville and the Bunnells I met at Prattville. I first went into the vicinity of Plumas County to look at timber lands in 1896, sixteen years ago. I cruised the timber a little at that time. I was there once or twice during the summer of 1896, covering about two months. I did not go back there again until the early spring of 1901. On my second trip back there in 1901 I took Mr. Golden with me. On my first trip into Plumas County in 1896 I ascertained by investigation in the field, that the Sierra Lumber

(Testimony of George E. Tuman.)

Co., did not own all of the good timber land in the district, but that a portion of it was still in Government ownership and in going back there in 1901 it was for the purpose of looking up these lands and possibly later inducing someone to furnish money to scrip them. I went to Susanville on an investigation trip in 1901 for the purpose of securing plats from the General Land Office as to entries. I went to Susanville shortly after I stared my cruising operations, so that there would be no waste work, although I had plats which I had secured in 1896, which I thought were nearly correct. If that timber land had been taken up between the years 1896 and 1901 I would probably have heard of it. I think I was in such close touch with the timber dealings in that section of the country that if anybody had taken up that timber land I would have heard of it. There was no active dealing in timber during the years 1896 to 1901 in that section of the country. I had no way of getting any information from the Sierra Lumber Co. as to the taking up of timber land. After finding out what was Government vacant timber lands, Mr. Golden and I continued to cruise the land in the field. Under the system which I was working with Mr. Golden [281] I could probably cruise one section a day.

The MASTER.—Q. Mr. Tuman, was that a regular cruise such as you would conduct when estimating timber, or was it just a prospecting trip to see where the timber lay without estimating it?

A. Not at the time my prospecting trip was made

(Testimony of George E. Tuman.)

in 1896, but this cruise was made not as I would make it now, but still accurate enough to locate the timber. Our system was to only run a single line to 40 acres, that is, to just go on a straight line through the 40 acres from some one direction and from this I decided in my mind as to the amount of timber on the 40 acres after going through it. I did not count the trees during this cruise. Under this system we would cruise, the two of us together, one section a day. That was a sufficient cruise for the purpose of taking up the timber land. In estimating expenses you understand in this job we had no wages to pay, we were doing our own work, so the only expense we had was in transporting our supplies and the buying of supplies, clothing, etc. I presume it would figure about $50 a month to cover such expenses. At that time I received from $5 to $10 per day for time in cruising. I worked for all those wages, about that time, from $5 to $10 a day doing cruising. Mr. Golden worked for the same pay. My purpose in going out and cruising this land was with a view of later having the timber scripped. At the time I started my operations I had no one in view to finance the project of scripping this land. A part of this land was subsequently taken up under my supervision and I was able to scrip part of the land, that is, I was able to scrip part of the land. I never personally went in the field to look for capital to finance the taking up of this land. [282] When I took Mr. Golden up with me, not wanting to pay wages, we wanted to

(Testimony of George E. Tuman.)

avoid that, I took Mr. Golden into partnership as to what we might get out of it ultimately. Golden did not have any money so I advanced the funds necessary for our work there. In the month of June, 1901, we had got together at that time a considerable list of lands suitable for taking up and we did not know where to place it. We had no one to take it but my former acquaintance Mr. Holbrook at Dunsmuir. Golden also knew him through some period of time; we decided to ask Mr. Holbrook to help us and I wrote him a letter sometime during the month of June, 1901, in response to which he came up to where we were at work in the timber. (That was Holbrook, Sr.) There we arranged with Mr. Holbrook that the prospective profits, if any, should be divided into three parts and in accordance with the arrangement Mr. Holbrook made a trip east during which he secured the co-operation of Mr. Curtis and Mr. Collins in our project. Mr. Holbrook first met Danl. G. Curtis, son of J. G. Curtis, at that time living at Ludlow, Pa. Danl. G. Curtis first interested his father and T. D. Collins of Nebraska, Pa. The two older men, Collins and Curtis, I believe, furnished all the money. Mr. Collins also has a son who lives in Washington. That makes just four members of each family, a father and son from each family. The son's name is E. S. Collins. Holbrook, Sr., came to me in the field in eastern Tehama County. Not all of the land that we took up was in Plumas County, a large part of it, especially that we scripped, was in

(Testimony of George E. Tuman.)

Tehama and it was in eastern Tehama County where Holbrook came to see me. In this contract with Holbrook the profits were to be divided one-third to each Golden, Holbrook and [283] myself. When Holbrook went east they arranged that a corporation would be formed for the acquiring of the land. I don't remember whether the corporation was formed before the land was acquired or not. The original arrangement was that Mr. Holbrook for himself and me, would have 10% of the stock and that the Curtises and Collinses would divide the remainder equally. I think that would make 45% each. In November, 1901, just before Mr. Holbrook went east, he and I bought Golden out. We paid Golden $3,000 for his interest. That was before Holbrook made his successful trip east to interest capital in these lands. He had already made one trip. On his first trip I do not think he met the Curtises. On that trip he met no one that was productive of benefit to us. It was before the second trip, on which Mr. Holbrook got acquainted with the Curtises and Collinses, that we bought Golden out, but we did not pay him until later, about January or February, 1902. We probably paid him a little when we bought him out and we cancelled his obligation of expenses which he should have been out during that previous summer's work. Golden did help on Mr. Holbrook's first trip east and went with him. Mr. Holbrook paid Golden's and his own expenses east. Golden got $3,000 clear and cancelled all his expenses, including the expense

(Testimony of George E. Tuman.)

of his trip east. The Curtises and Collinses were to buy lands from Holbrook and myself when the corporation was formed, and pay a certain rate per acre for the land. My recollection is that that rate was $7.50 per acre. Mr. Holbrook and I were to receive $7.50 an acre for the land and they contemplated the formation of a company and Holbrook and I were to receive $7.50 per acre, part cash and part stock, and a 10% subscription that Holbrook put in for himself and me in that company was part of the purchase price of these lands. I don't know just how you would want to place it, but those are the facts. [284] I understand that it was a written agreement between Holbrook, Collins and Curtis. Under this agreement I think that we were to deliver a minimum of 42,000 acres. I am inclined to think that we were left free to put in more if we could, but I don't think there was a maximum placed upon it. I don't know whether they would have taken 100,000 acres or not. At the time Holbrook went east, we only figured on 42,000 acres. We had that amount listed. That is the amount of land that I cruised up to the first of August. I cruised more land subsequent to that date. I am not clear whether that was included in the contract or not; am inclined to think it was not. The Curtis, Collins and Holbrook Co. acquired a great deal of timber land during the years 1901–02 and I think in 1903. But after that they did not seem to care about acquiring more lands. We got $7.50 for all the land that Holbrook

(Testimony of George E. Tuman.)

and I delivered to the Curtis and Collins people. I think for some of the later lands we got as much as $10 an acre. There was more than the 42,000 acres that we sold for $7.50 an acre. I think about the last 15,000 we sold to the company we received $10 an acre for. I think all the rest went to the company for $7.50 an acre. The 15,000 is approximate. I have heard of the Pennsylvania Lumber Co. Articles of incorporation were formed May 8, 1902; the Curtis, Collins and Holbrook on the 15th day of August, 1902.

Mr. PIER.—The Articles of Incorporation of the Pennsylvania Lumber Company show that D. G. Curtis, J. M. Beamis, Chas. H. Holbrook, Chas. A. Shurtleff and E. D. Bullard were the incorporators. (Admitted by Mr. Shurtleff.)

I know D. G. Curtis. I do not know whether he is [285] one of the incorporators of the Curtis, Collins and Holbrook Company or not. Irving F. Moulton, one of the incorporators of the Curtis, Collins & Holbrook Co. is the cashier of the Bank of California. I have met both of the Curtises and met D. G. Curtis late in the year 1901 first; J. G. Curtis I met some time during the following year. I don't know just when. I met T. D. and E. S. Collins during the year 1902. I probably met D. G. Curtis first in San Francisco. D. C. Curtis went out and looked at the lands in Plumas Co. in 1902. Mr. Curtis arrived in December, 1901, and it was impossible to go up to the timber at that time. The Collinses went out and looked at the

(Testimony of George E. Tuman.)

timber land also. T. D. Collins was there in 1902, and he went out to look at the land through Plumas County. E. S. Collins also went out and looked at the land. They stayed at Bunnell's. Holbrook was along on the trip. I was directing the party, showing them where the timber was. I don't know what interest C. H. Holbrook, Jr. had in the corporation. The Curtis, Collins & Holbrook Co. was formed with a capital stock of $500,000, divided into 5,000 shares of $100 par value.

Mr. PIER.—The original incorporators were J. G. Curtis, T. D. Collins, D. G. Curtis and E. S. Collins, Chas. H. Holbrook, Irving F. Moulton, Chas. H. Holbrook, Jr. Each subscribed for two shares of stock at $200 each.

In paying for our stock we paid the full amount, that is the full $100 a share for our stock. We did not pay more than the $100 a share.

Q. Do you know whether or not all the stock was fully paid up or was there any treasury stock?

A. I think there was treasury stock at first. We acquired land in Plumas County and vicinity [286] under this contract for the Curtis, Collins & Holbrook Co. about 60,000 acres at $7.50 an acre, about 15,000 acres at $10 an acre. We started out to acquire these lands by buying forest reserve scrip and placing it on the lands that I had located. I suppose we acquired between 40 and 50 thousand acres by the scrip method. I may have listed 50,000 acres, I could not say. I think it was probably fully 50,000 acres by scrip. Mr. Holbrook

(Testimony of George E. Tuman.)

purchased the scrip. I had nothing directly to do with the acquiring of the scrip. I think I was present at some of the negotiations for it, but did not take any active part in it. The scrip was bought in San Francisco through the agency of Chas. E. Swazy, formerly of Marysville. It was nearly all forest reserve scrip that we bought from the Southern Pacific. I don't think we got any from the Santa Fe. We paid from $4.00 to $4.50 an acre, I think, something like that; I have forgotten now. After buying the 40 or 50 thousand acres of land the rest we acquired by buying timber and stone entries. We could not find any more scrip. There was no scrip available during the year 1902. There might have been a little lieu, perhaps only two or three thousand acres. I included that in speaking of scrip lands. I don't know whether there was any scrip to be purchased at any better figure than $5 or not.

Q. Do you know whether or not you could have bought scrip at any better figure than say $5 an acre at that time? A. I don't know.

Q. How much were you willing to pay for scrip at that time to get it?

A. I think we would have offered to pay up to $5, anyway. I don't think there was any in the market now. I could not tell whether there was or not. I think that we were willing to pay $5. [287]

The MASTER.—Q. Did you pay for the scrip so that $3 would represent the profit, or did the

(Testimony of George E. Tuman.)

company pay for the scrip and give you $7.50?

A. We were to deliver the land with title to the company at $7.50 an acre, they leaving us free of course to buy scrip, in other words, to furnish the title. I was not among the original incorporators. I never got 5% of the stock, but I got some stock. According to the original agreement I was to get 5% of the stock and pay par for it out of the profits made from the timber land we delivered. Mr. Holbrook and I had a private disagreement later and I simply did not get it. The stock that we were both entitled to was issued to Mr. Holbrook in his name at first. The whole 10% of the stock was issued to him. The contract was between Curtis, Collins and Holbrook. My name did not appear in it, therefore he would be entitled to receive the stock and the money and my contract as to half of his interest was between myself and Holbrook. I first demanded my interest in the stock in the early part of 1903. I had no trouble with Holbrook prior to the time I demanded my stock. The difficulty arose over the stock. He thought at the time that he had done more toward the success of our enterprise than I had and was entitled to more than half. I never knew what his claim was as to the basis upon which it should be divided. I sued him in effecting the settlement. Prior to the settlement Holbrook sold a little of the stock that had been issued to him during that time. Of the stock that he had remaining our settlement was that I took 200 shares and he paid me probably for

(Testimony of George E. Tuman.)

another 100 shares, $10,000, that was the final settlement. Prior to that time he had sold some stock and given me some money for the sale of the stock. How much that was I don't remember. I got [288] 200 shares of stock and $10,000 in cash for another 100 shares.

The MASTER.—Q. You would have been entitled to 250 shares all told, would you not?

A. I was entitled to more than that.

Q. Well, you were entitled to—

A. (Interrupting.) About 500 shares, I think. Mr. Holbrook and I did not take all of our profit for the sale of these lands in stock. Some of it we received in money. The Curtis, Collins & Holbrook Co. paid the money into the bank to Mr. Holbrook's credit for the lands. Mr. Holbrook did not divide up the amount of the profits. I drew out some money from time to time for personal expenses, but most of the money we received from the first sale of scrip land was left with Mr. Holbrook in a joint account, that is the surplus money. It was carried in Holbrook's name, but it was presumed to be a joint account. It was partnership money. I had no right to draw against it. I filed suit against Holbrook in June or July, 1903, in the Superior Court of this state and city. My attorney was Frank McGowan; Mr. Holbrook's attorney was Wheeler. I don't know exactly how much timber land the Pennsylvania Lumber Co. acquired; about 40,000 acres, I think. I do not still hold the 200 shares of stock. I sold it last Decem-

(Testimony of George E. Tuman.)

ber (1912) to T. D. Collins. I received $730 a share. When we found that we could not get any more land by scrip we pursued the method of buying that which had been taken up under the timber and stone act. I think some of the entrymen had taken up land which we wished to acquire at the time we purchased our last scrip. I think there was some scrip bought all during the year 1902. I think that most of the scrip was bought during the winter and early spring of 1901–2. I think some of the entries under the timber and stone [289] act that we afterwards bought were entered during the early part of 1902.

Q. Well, now the big bulk of land that you wished to acquire if you could have obtained scrip, you would have taken it up with scrip, would you not? That big bulk of the land that you subsequently acquired, some 30,000 acres that you got under the timber and stone entries—if you could have acquired that by scrip, you would have scripped it would you not?

A. I don't know whether we would or not. We might.

MASTER.—Q. Did you take up approximately 30,000 acres under the Timber and Stone Act.

A. I think we bought approximately 25,000 acres taken up under the Timber and Stone Act. Yes, I think the corporation got at least fully as much land as we expected to get in that district, if not more, at the time we started out. I think the Curtis, Collins & Holbrook people acquired the last of

(Testimony of George E. Tuman.)

their land in the early part of 1903. There might have been a little outstanding, but I think it was mostly in 1903. It is hard to say how much this land was worth. We were selling it to the company at from $7.50 to $10 an acre. It is worth now between $40 and 50 an acre. Holbrook sold his stock in 1904, in February, to Mr. T. D. Collins, for $150 to $200 a share.

Mr. SHURTLEFF.—If counsel wants that admission from us, it is worth $50 an acre right through.

Mr. PIER.—The land is worth $50 an acre now?

Mr. SHURTLEFF.—Yes.

Mr. Holbrook, Sr., died about two years ago. I think before this suit was commenced. There would not be any way of acquiring timber land other than scrip unless there would be timber and stone claims to buy. [290]

Q. So that scrip being scarce you would have to buy entries from people that made the entries under the Timber and Stone Act? Is that correct?

A. If we bought any at all we would have to have some kind of title. Mr. Holbrook and I were anxious to acquire timber land in Plumas County lying in T. 25 N., R. 10 E. At that time there might have been some of that entered and some of it might not.

Q. Most of it had not, as a matter of fact?

A. Probably.

Q. Consequently you were desirous of having people make entries on it so that you could buy it?

(Testimony of George E. Tuman.)

A. We did not object.

Q. As a matter of fact, didn't you let it be known that you would like entries to be made?

A. I might have done that; yes.

Q. You let that be known in a very vigorous way, did you not?

A. I could not say. It was not difficult to let it be known that we were acquiring land, that we were filing scrip on land, and had been for some time; everybody knew it. Many knew that we were acquiring lands and that a company was being formed for the purpose of buying lands in the way of scrip locations. The method used in notifying people as to what land would be desirable was that I gave two or three men plats which showed what I considered good timber land. These were J. Heppe and J. E. Remick, commonly called Ned Remick, who sits here in court. There were probably one or two others to whom I probably pointed out some land. I do not think I gave Elam any descriptions. I might have given Head some. I was living or boarding with Head and might have shown them to him or talked [291] to him about them. I think I gave two or three, something like that, to Alexander Cameron. When I gave these descriptions to Remick, Heppe, Head and Cameron I gave them no instructions at all. I only told them that the lands marked on these plats I considered good timber land. I cannot recall now that I gave them any definite instructions about giving entrymen any assistance in taking up

(Testimony of George E. Tuman.)

the lands. I might have said to them that possibly money could be secured to help some people out that did not have sufficient cash. I think I had a talk with John W. Aid the same way that I did with Heppe and Remick. I met Aid the first time in Prattville. I only talked over with him in a very general way the taking up of timber land. All that I would really feel at all definite about would be to show him a plat showing lands on there marked with an X or a check in some manner against a 40-acre tract which I would undoubtedly consider timber land. I could not have said anything else to him other than that. I might have told him that in cases where people did not have sufficient money to cover the expense of taking up timber land, and the payment to the Government of the money, that it might be arranged for them.

Q. That it might be arranged for them? Did you tell him anything about what was being paid for the timber land?

A. In what way do you mean?

Q. That is what profit would go to the entryman for his timber land, how much he would be paid for his timber land in case he took it up?

A. Well, I probably, if I was asked a question about anything like that by Aid or anyone else, I would probably state that the land would not be worth more than so much, a certain amount. [292]

Q. When you told them how much that would be worth would you tell them there would be at least $100 profit in taking up this land?

(Testimony of George E. Tuman.)

A. I do not remember stating so definitely, but very likely the impression was left in some way that the profit to the man on the timber claim would be at least $100 over and above all what it would cost him.

Q. Did you tell him that it could be arranged so that all the expenses could be paid and the Government fees would be paid and the price of the land to the Government could be paid to the entryman?

A. Well, it would be as I have said a moment ago, that they would generally know somewhat near what their land was costing them, and as we were buying lands at about a certain amount it was easy to arrive at the resulting profit to an owner of a claim. As to the other part of the question, about the advancing of the money, why, you see there was not any particular promise made in connection with it.

Q. Well, now, when Mr. Aid came around and said, "I have a party here who are willing to take up land, but they have not got any money, that is I have got my two brothers and my father and Mr. Rhodes, they have not got any money to take up lands with; they have not got the money to pay the expenses," what arrangement would you make in that case—what arrangement did you make with John Aid in that case?

A. I might, and probably did, loan him money from time to time. I loaned John Aid money for the purpose of getting his land. I understood the money was loaned to each individual and not to him personally. I did all my talking with Mr. Aid.

(Testimony of George E. Tuman.)

I don't think I talked with anyone else, he was the only one I knew personally and whom I talked with. I think I loaned to Aid and to his two brothers and father and perhaps others [293] that were with him, money to take up their land. I gave them their money in cash, gold coin. I do not know where I handed it to him. I do not know of my own knowledge who handed it to them. I might have given the money personally to John W. Aid; I cannot say now, and I cannot tell now whether I gave it to Aid for all of them or whether it was paid to each one separately. I cannot tell you whether he gave it to Mr. Elam to give it to them. I gave some form of note or other evidence of indebtedness as security for the money. I was not out there loaning money for interest.

Q. You had some other idea when you loaned the money at the time you loaned it, did you not?

A. Oh, yes, I might have a good many ideas.

Q. You probably had a number of ideas, but what was the real idea in your mind in loaning them the money? A. The real idea?

Q. Yes, what was the real purpose of loaning them the money?

A. Why, it was to enable them to pay for their land, to pay the Government for their land.

Q. Did you have any idea about acquiring that land subsequently? A. Well, I hoped I would.

Q. You hoped you would? A. Yes.

Q. Would you have loaned the money to them if you had thought you would not have gotten their land?

(Testimony of George E. Tuman.)

A. Well, I considered the loan of the money to these people fairly safe, for after paying the Government for the land they would have title to a piece of land, and I hoped to purchase the land later, certainly. I did not take the precaution to look up the various individuals to whom I loaned money in this way to find out [294] whether they were good financial risks or not. As a matter of fact, I relied on Mr. Aid in loaning the money. My assurance that I would get my money back was that I knew that these people who had applied for this money had made an entry on lands, were preparing at least to make their final proof on the land and therefore needed the money to complete their purchase. If they had refused to convey the land to me I could have sued them for the money I parted with. If anybody had refused to convey the land to me or refused to return the money, I would have endeavored to recover it by means of a suit. One Frank McManus did go back on me. I did not recover the money from him and I never sued him. I remember the name of Will Lawrence. I loaned him $400. I did not get the land and I did not get the money back. I never sued him. McManus perfected his title to the land and I think sold it to somebody else. I don't know how much he got for it. When I showed Mr. Remick these plats of land and told him they were good timber land I told him that I would endeavor to secure him a fee out of the selling price of the land of $25.00 for each claim. Mr. Remick was paid his $25.00.